
United States
Circuit Court of Appeals
For the Ninth Circuit.

ROBERT DONALDSON,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for
the Northern District of California, First Division.

FILED

APR - 3 1913

No. 2248

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. —.

THE UNITED STATES

vs.

ROBERT DONALDSON.

Praeceptum for Transcript.

To the Clerk of the said Court:

Sir: Please make return to the Writ of Error issued by transmitting to the United States Circuit Court of Appeals for the Ninth Circuit true copies of the following, to wit:

1. The Indictment in full, with all the endorsements thereon.
2. Plea of said defendant Robert Donaldson.
3. Minutes of Trial.
4. Verdict.
5. Motion for New Trial.
6. Order Denying Motion for New Trial.
7. Judgment.
8. Bill of Exceptions.
9. Petition for Writ of Error.
10. Assignment of Errors.
11. Order Allowing Writ of Error and Supersedeas.
12. Bond on Writ of Error. [1*]

Also transmit original Writ of Error and original Citation thereon, together with endorsement thereon

*Page-number appearing at foot of page of original certified Record.

of admission of service on defendant in error, and certify to the above as being the return to the Writ of Error.

Dated, January 24th, 1913.

FRANK R. SWEASEY,
CARL E. LINDSAY,

Attorneys for Plaintiff in Error.

[Endorsed]: Filed Jan. 25, 1913. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [2]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

Indictment.

At a stated term of said Court, begun and holden at the City and County of San Francisco, within and for the State and Northern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and twelve.

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: That

HENRY GALLAGHER and ROBERT DONALD-
SON,

hereinafter called the defendants, heretofore, to wit, on the first day of December, in the year of our Lord one thousand nine hundred and eleven, at San Francisco, in the State and Northern District of California then and there being, did then and there knowingly, wilfully, wickedly, unlawfully, corruptly

and feloniously conspire, combine, confederate and agree together and with one David G. Powers and one Emil Fiedler, also known as K. E. Fiedler, and with divers other persons whose names are to the Grand Jurors aforesaid, unknown, to commit an offense against the United States, that is to say:

They, the said defendants did, at the time and place aforesaid, knowingly, wilfully, unlawfully, wickedly, corruptly and feloniously, conspire, combine, confederate and agree together and with said David G. Powers and Emil Fiedler also known as K. E. Fiedler, and said divers [3] other persons whose names are, as aforesaid, to the Grand Jurors unknown, to wilfully, unlawfully, feloniously, fraudulently and knowingly, import and bring into the United States at the port of San Francisco, in the State and District aforesaid, and assist in so doing, certain opium and certain preparations and derivatives thereof, to wit, a large amount of opium prepared for smoking purposes, the exact amount of which is to the Grand Jurors aforesaid, unknown, and for that reason not herein set forth, contrary to law.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Robert Donaldson, on the tenth day of December, in the year of our Lord one thousand nine hundred and eleven, within the State and Northern District of California, did introduce one David G. Powers to the boatswain and the engineer's cabin

boy of the steamer "Siberia," the names of which said last named persons are, to the Grand Jurors aforesaid, unknown.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Robert Donaldson, on the tenth day of December, in the year of our Lord one thousand nine hundred and eleven, within the State and Northern District of California, [4] did propose to said David G. Powers and request said David G. Powers to aid and assist in unlawfully landing in the United States from the steamship "Siberia" in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That in furtherance of said conspiracy, combination, confederation and agreement and to effect and accomplish the object thereof, the said Henry Gallagher, on the thirteenth day of December, in the year of our Lord one thousand nine hundred and eleven, did go with the said David G. Powers, from the City and County of San Francisco, to the City of Oakland, in the State and District aforesaid.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That

HENRY GALLAGHER and ROBERT DONALD-
SON

hereinafter called the defendants, heretofore, to wit, on the first day of December, in the year of our Lord one thousand nine hundred and eleven, at San Francisco, in the State and Northern District of California, then and there being, did then and there knowingly, wilfully, wickedly, [5] unlawfully, corruptly and feloniously conspire, combine, confederate and agree together and with one David G. Powers and one Emil Fiedler, also known as K. E. Fiedler, and with divers other persons whose names are to the Grand Jurors aforesaid, unknown, to commit an offense against the United States, that is to say:

They, the said defendants, did, at the time and place aforesaid, knowingly, wilfully, unlawfully, wickedly, corruptly and feloniously, conspire, combine, confederate and agree together and with said David G. Powers and Emil Fiedler, also known as K. E. Fiedler, and said divers other persons whose names are, as aforesaid, to the Grand Jurors unknown, to wilfully, unlawfully, feloniously, fraudulently and knowingly, receive, conceal and facilitate the transportation and concealment after importation, certain opium and certain preparations and derivatives thereof, to wit, a large amount of opium prepared for smoking purposes, the exact amount of which is to the Grand Jurors aforesaid, unknown,

and for that reason not herein set forth, contrary to law, and which said opium prepared for smoking purposes would be, as each of the defendants then and there well knew, opium which had been theretofore imported into the United States contrary to law, from some foreign port or place to the Grand Jurors aforesaid, unknown.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Robert Donaldson, on the tenth day of December, [6] in the year of our Lord one thousand nine hundred and eleven, within the State and Northern District of California, did introduce one David G. Powers to the boatswain and the engineer's cabin boy of the steamer "Siberia," the names of which said last named persons are, to the Grand Jurors aforesaid, unknown.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Robert Donaldson, on the tenth day of December in the year of our Lord one thousand nine hundred and eleven, within the State and Northern District of California, did propose to said David G. Powers, and request said David G. Powers to aid and assist in unlawfully landing in the United States from the steamship "Siberia," in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Henry Gallagher, on the thirteenth day of December in the year of our Lord one thousand nine hundred and eleven, did go with the said David G. Powers, from the City and County of San Francisco, to the City of Oakland, in the State and District aforesaid. [7]

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

THIRD COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That

HENRY GALLAGHER and ROBERT DONALD-
SON,

hereinafter called the defendants, heretofore, to wit, on the thirteenth day of December in the year of our Lord one thousand nine hundred and eleven, in the bay of San Francisco, in the State and Northern District of California, then and there being, did then and there unlawfully, wilfully, feloniously, fraudulently and knowingly import and bring into the United States and assist in so doing, certain opium and a certain preparation of opium, to wit, three hundred and twenty five-tael cans of opium prepared for smoking purposes, from some foreign port or place to the Grand Jurors aforesaid, unknown.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that the said defendants did commit the offense set forth in this count of this indictment by then and there unlawfully, knowingly, wilfully and feloniously aiding and abetting, counselling, inducing and procuring, the commission of the said offense by one David G. Powers and one Emil Fiedler, also [8] known as K. E. Fiedler.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

FOURTH COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: That

HENRY GALLAGHER and ROBERT DONALDSON,

hereinafter called the defendants, heretofore, to wit, on the thirteenth day of December, in the year of our Lord one thousand nine hundred and eleven, at Oakland, in the County of Alameda, in the State and Northern District of California, then and there being, did then and there unlawfully, wilfully, feloniously, fraudulently and knowingly receive, conceal and facilitate the transportation and concealment after importation, of certain opium and of a certain preparation of opium, to wit, three hundred and twenty (320) five-tael cans of opium prepared for smoking purposes, which said three hundred and twenty five-tael cans of opium prepared for smoking

purposes had been theretofore, as they, the said defendants and each of them then and there, to wit, at the time and place aforesaid, well knew, had been imported into the United States contrary to law, from some foreign port or place to the Grand Jurors aforesaid, unknown. [9]

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that the said defendants did commit the offense set forth in this count of this indictment by then and there unlawfully, knowingly, wilfully and feloniously aiding and abetting, counselling, inducing and procuring, the commission of the said offense, by one David G. Powers and one Emil Fiedler, also known as K. E. Fiedler.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

J. L. McNAB,

United States Attorney.

Names of witnesses examined before the Grand Jury on finding the foregoing indictment:

D. G. POWERS.

W. H. TIDWELL.

JOSEPH HEAD.

J. G. STONE.

[Endorsed]: A true bill. A. S. Carman, Foreman Grand Jury. Presented in open court and filed Sep. 20, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [10]

[**Minutes—November 25, 1912—Arraignment, Plea, Order of Severance as to Henry Gallagher, Trial, etc.**]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 25th day of November, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 5137.

UNITED STATES

vs.

ROBERT DONALDSON et al.

The defendant Robert Donaldson being present in open court with his counsel, Carl Lindsay, Esqr., and Frank Sweasey, Esqr., said defendant was then and there duly arraigned upon the indictment herein against him, to which said indictment he then and there pleaded not guilty, which said plea was by the Court ordered and is hereby entered. On motion of S. C. Wright, Esqr., attorney for defendant Henry Gallagher herein, no objection being made thereto, by the Court ordered that a severance as to said defendant for trial be, and the same is hereby granted.

On motion of John L. McNab, Esqr., U. S. Atty., by the Court ordered that the trial as to defendant Robert Donaldson do now proceed: The following named jurors were duly drawn, sworn, examined,

accepted and impaneled to try the case, to wit: E. C. Elwood, F. C. Dorris, Geo. W. Eliassen, N. B. Eckeles, Thos. Murphy, H. S. Engle, J. W. Elrod, Ben D. Dixon, Norman Ellsworth, Edmund Hayward Haas, A. G. Dick, A. E. Almind.

C. E. Carlson and Geo. B. Scott, jurors drawn, were by defendant excused. [11]

James Dunn, a juror drawn, was excused by the Government.

E. P. Berry, a juror drawn, was excused by consent.

Mr. McNab, the U. S. Atty., stated the case and called David G. Powers, K. E. Fiedler, Young Tai, and Joseph Head, who were each duly sworn and examined on behalf of the United States.

Mr. Sweasey, one of the attorneys for defendant, made a motion that Court instruct jury to acquit, which said motion was by the Court denied.

Mr. Lindsay, one of attorneys for defendant, called Robert Donaldson, R. P. Schwerein, Arnold Foster, D. G. Fraser, who were each duly sworn and examined on behalf of defendant. The case was then argued by Benj. L. McKinley, Asst. U. S. Atty., and Carl Lindsay for defendant, and thereupon the further trial was continued until to-morrow at 10 o'clock A. M. [12]

[Minutes—November 26, 1912—Trial (Resumed).]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 26th day of November, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 5137.

UNITED STATES

vs.

ROBERT DONALDSON.

The jury sworn to try the case and the defendant with his counsel being present in open court, the further trial of this case was resumed. John L. McNab, U. S. Attorney, argued the case, and thereupon the Court charged the jury, who thereupon retired to deliberate upon their verdict and at 12 o'clock M., returned into court with the following verdict in writing: "We, the jury, find Robert Donaldson, the defendant at the bar, not guilty on the 1st and 3d counts of the indictment and guilty on the 2d and 4th counts of the indictment. Ben D. Dixon, foreman," which said verdict was by the Court ordered and is hereby recorded, and to which verdict each juror upon being asked if that was his verdict replied in the affirmative. Further ordered that defendant appear for judgment on November 29, 1912, at 10 o'clock A. M. [13]

*In the District Court of the United States, in and for
the Northern District of California.*

No. 5137.

THE UNITED STATES OF AMERICA

vs.

ROBERT DONALDSON.

Verdict.

We, the Jury, find Robert Donaldson, the defendant at the bar, not guilty on the 1st and 3d counts of the indictment, and guilty on the 2d and 4th counts of the Indictment.

BEN D. DIXON,

Foreman.

Filed Nov. 26, 1912, at 12 o'clock and —— minutes
M. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [14]

**[Notice of Motion to Set Aside Verdict and to Grant
a New Trial.]**

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5137.

UNITED STATES

vs.

HENRY GALLAGHER and ROBERT DONALD-
SON,

Defendants.

MOTION OF DEFENDANT ROBERT DONALD-
SON FOR A NEW TRIAL.

To the Clerk of the Above-entitled Court, and to J.
L. McNab, United States Attorney:

YOU WILL PLEASE TAKE NOTICE that on the 29th day of November, 1912, at the opening of court on said date, or as soon thereafter as counsel can be heard, ROBERT DONALDSON, one of the defendants in the above-entitled action, will move said Court to set aside and vacate the verdict of the jury herein against said defendant ROBERT DONALDSON and to grant said defendant a new trial in said cause, on the following grounds:

1. Insufficiency of the evidence to justify said verdict and that the same is against law.

2. Errors of the Court occurring at the trial affecting the substantial rights of the said defendant ROBERT DONALDSON to which exceptions were duly taken.

3. That the indictment in said cause fails to state an offense against the laws of the United States.
[15]

4. That the Court misdirected the jury in matters of law and erred in its charge to the jury.

Respectfully,

FRANK R. SWEASEY,

CARL E. LINDSAY,

Attorneys for Said Defendant.

Service of copy of the above and foregoing is hereby duly admitted this 27th day of November, 1912.

JOHN L. McNAB,
United States Attorney.

[Endorsed]: Filed Nov. 27, 1912. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [16]

[Minutes Nov. 30, 1912—Motion for New Trial, etc.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 30th day of November, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

No. 5137.

UNITED STATES

vs.

ROBERT DONALDSON.

[Minutes—Nov. 30, 1912—Motion for New Trial, etc.]

The defendant herein being present in open court with his counsel, said defendant was called for judgment: Thru his counsel said defendant then and there made a motion for a new trial, which was by the Court denied. He then made a motion in arrest of judgment, which said motion was by the Court denied. The defendant being fully informed by the Court of the nature of the indictment herein against him, of his plea of not guilty and of his trial and the verdict of the jury, and no sufficient cause being shown or appearing to the Court why judgment should not be pronounced against him, now here by the Court ordered that said defendant be, and he is hereby sentenced to be imprisoned for the term of one

year in the County Jail of Alameda County, California, and that he pay a fine of \$200, and in default of the payment of said fine, that he be further imprisoned until said fine be paid or until he be otherwise discharged by due course of law. [17]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 30th day of November, in the year of our Lord one thousand nine hundred and twelve.
Present: The Honorable JOHN J. DE HAVEN.

No. 5137.

Convicted of Importing Opium into the United States.

THE UNITED STATES OF AMERICA,

vs.

ROBERT DONALDSON,

Defendant.

Judgment.

JUDGMENT ON VERDICT OF GUILTY.

John L. McNab, Esquire, *Assistant* United States Attorney, the defendant with his counsel, Carl Lindsay and Wm. Sweasey, Esqs., came into court. The defendant was duly informed by the Court of the nature of the Indictment filed on the 30th day of September, 1912, charging him with the crime of importing and bringing opium into U. S. and conspir-

ing to import and bring opium into the U. S.; of his arraignment and plea of Not Guilty, of his trial and the verdict of the Jury on the 26th day of November, 1912, to wit: "We, the Jury find Robert Donaldson, the defendant at the bar, Not Guilty on the 1st and 3d counts of the Indictment and Guilty on the 2d and 4th counts of the Indictment."

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown or appearing to the Court; [18]

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said Robert Donaldson, having been duly convicted in this court on the 2d and 4th counts of the Indictment herein, be and he is hereby sentenced to be imprisoned for the term of 1 year in the Alameda County Jail, and further, that he pay a fine of \$200, and in default of the payment of said fine that he be further imprisoned until said fine be paid.

December 3d, 1912.

JOHN J. DE HAVEN,
United States District Judge, Northern District of
California.

[Endorsed]: Filed Dec. 3, 1912. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [19]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5137.

UNITED STATES

vs.

HENRY GALLAGHER and ROBERT DONALD-
SON,

Defendants.

**Petition for Writ of Error by Defendant Robert
Donaldson, and Order Allowing Writ.**

The petitioner, ROBERT DONALDSON, respectfully represents:

That heretofore, to wit, on the 30th day of November, 1912, by final judgment of the District Court of the United States, in and for the Northern District of California, First Division, rendered and entered in a criminal action therein pending and in which the United States is plaintiff and your petitioner defendant, it was adjudged that your petitioner was guilty of the offense of conspiracy, as charged in the Second Count of the Indictment in the above-entitled criminal action, and of the offense of receiving, concealing and facilitating the transportation and concealment after importation of opium, as charged in the Fourth Count of said Indictment; and as a punishment therefor your petitioner was ordered to pay a fine of Two Hundred Dollars (\$200.00) and to be imprisoned in the County Jail of the County of Alameda, State of California, for a period of one year.

[20]

That your petitioner claims a writ of error against said judgment from the United States Circuit Court of Appeals for the Ninth Circuit, and in that behalf avers that there is a manifest error in said Indictment and in the verdict upon which the same was based, and as set out in the Assignment of Errors filed herewith.

WHEREFORE, your petitioner prays that he be allowed herein a Writ of Error upon said judgment rendered against him from the United States Circuit Court of Appeals for the Ninth Circuit to the said District Court of the United States, in and for the Northern District of California, First Division; that he be awarded a supersedeas upon said judgment and all necessary process, including bail.

FRANK R. SWEASEY,
CARL E. LINDSAY,
Attorneys for Petitioner.

ORDER ALLOWING WRIT.

The foregoing petitioner for a Writ of Error is granted; the Writ of Error and the supersedeas therein prayed for pending the decision upon the Writ of Error are allowed, and the defendant ROBERT DONALDSON is admitted to bail upon the Writ of Error in the sum of \$2000.00.

The Bond for costs upon the Writ of Error is hereby fixed at the sum of \$100.00.

JOHN J. DE HAVEN,
United States District Judge.

[Endorsed]: Filed Dec. 5, 1912. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5137.

UNITED STATES

vs.

HENRY GALLAGHER and ROBERT DONALD-
SON,

Defendants.

Assignment of Errors.

Of October Term, in the Year of our Lord One
Thousand Nine Hundred and Twelve.

Afterwards, to wit, on the 5th day of December, A.
D. 1912, in the same Term, before the Justice of the
United States Circuit Court of Appeals for the
Ninth Circuit, at the City and County of San Fran-
cisco, in the State and Northern District of Califor-
nia, comes the said Robert Donaldson, by Messrs.
Frank R. Sweasey and Carl E. Lindsay, his counsel,
and says: That in the record and proceedings in the
action of United States vs. Robert Donaldson, No.
5137, in the District Court of the United States, in
and for the Northern District of California, First
Division, there is manifest error in this, to wit:

1. That the said District Court committed mani-
fest error in overruling the objection of the Attorneys
for the defendant **ROBERT DONALDSON** to the
question put by the United States Attorney to the
witness David G. Powers, as follows: [22]

“Mr. McNAB.—Q. Mr. Tidwell never spoke to
you about this matter until he sent for you after he

seized these letters that had gone out from the jail which disclosed Mr. Donaldson's connection, did he?"

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

2. That the said District Court committed manifest error in overruling the objection of the Attorneys for the defendant ROBERT DONALDSON to the question put by the United States Attorney to the witness David G. Powers, as follows:

"Mr. McNAB.—Q. And it was only after he had this positive information in these letters relating to Mr. Donaldson and Mr. Gallagher that he ever sent for you at all?"

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

3. That the said District Court committed manifest error in refusing to give the following Instruction (No. 11) requested by the defendant ROBERT DONALDSON, viz.:

"In order to convict the defendant of the crime of conspiracy as alleged in the indictment, you must not only believe from the evidence beyond all reasonable doubt that such conspiracy was actually and completely formed, but that subsequent to such complete formation some one or more of the overt acts alleged in the indictment were committed and that such act or acts were in furtherance of the conspiracy and not a part of it.

"Generally a conspiracy, such as charged here,

must have its formation stage, its period of organization, its [23] preparatory steps to preliminary arrangements, which may consume considerable time before the parties are ready to begin actual open operations. During all such times, and until some act has been done to effect the purpose—some overt act—the crime has not been complete, and a conviction cannot be had without proof of such overt act, no matter how strong may be the proof as to the actual agreement or conspiracy to commit the crime.”

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

4. That the said District Court committed manifest error in refusing to give the following instruction (No. 12) requested by the defendant ROBERT DONALDSON, viz.:

“I charge you that you cannot convict the defendant under either the counts for conspiracy, unless you find beyond a reasonable doubt that defendant entered into a conspiracy with others named in the indictment for the purpose therein stated, and that in pursuance of such common understanding and to carry such conspiracy into effect some one of the overt acts charged was committed as therein stated. In this connection I further charge you that no overt act charged or proven can be held by you as sufficient to establish the offense charged unless you shall first have found such overt act to have been committed subsequent to the complete formation of the conspiracy, and that it was in furtherance of such fully completed conspiracy, and not a part of [24]

it; that such overt act must not be one of a series of acts constituting the agreement or conspiracy, but a subsequent independent one following the complete agreement or conspiracy and done to carry into effect the object of the original combination."

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

5. That the said District Court committed manifest error in refusing to give the following Instruction (No. 10) requested by the defendant ROBERT DONALDSON, viz.:

"In the indictment in this case it is charged that the defendant Donaldson committed two alleged overt acts in furtherance of the conspiracy charged, namely, that at a certain time and place, he did introduce one David G. Powers to the boatswain and the engineer's cabin boy of the steamer 'Siberia,' and that at a certain time and place he did propose to said David G. Powers and request said David G. Powers to aid and assist in unlawfully landing in the United States from the steamship 'Siberia' in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes.

"You must determine from the evidence, first, whether such acts or either of them, were actually committed by the defendant, and, second, whether such acts, if proven, were in furtherance of the objects of the alleged conspiracy, and committed subsequent to its complete formation. It is not enough that it be proven that the said alleged acts were ac-

tually [25] committed, for unless they followed the complete formation of the conspiracy, and were in furtherance of the object thereof, they are not overt acts within the meaning of the statute. If you believe from the evidence that such acts, if proven, were a part of the alleged conspiracy and necessary to its complete formation and not subsequent to and in furtherance thereof, or if you have a reasonable doubt arising from the evidence as to such matter, the defendant cannot be convicted on such proof.”

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

6. That the said District Court committed manifest error in refusing to give the following Instruction (No. 13) requested by the defendant ROBERT DONALDSON, viz.:

“Evidence has been given concerning an alleged overt act of the defendant Henry Gallagher alleged to have been committed in furtherance of the conspiracy charged in the indictment. In this connection I charge you that no act of the defendant Gallagher can be considered by you as evidence of the guilt of the defendant Donaldson, unless it has been proven to your satisfaction and beyond all reasonable doubt that the said defendants Gallagher and Donaldson conspired and agreed together as alleged in the indictment. It is not enough that you may believe that either one of said defendants conspired with others. Before any act or declaration of the defendant Gallagher can be used against the defendant [26] Donaldson it must clearly appear from the evidence that

they were co-conspirators as alleged in the indictment, and if it does not so clearly appear to your satisfaction and beyond a reasonable doubt, you must disregard any and all evidence as to any act or declaration of said Gallagher.”

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

7. That the said District Court committed manifest error in giving to the jury the following charge, viz.:

“When the fact of the conspiracy is established, it is the law that the act of one conspirator is the act of all and is binding upon all,—that is, while the conspiracy is in prosecution. If, therefore, you find from the evidence to a moral certainty and beyond a reasonable doubt that a conspiracy in fact existed between the defendants Gallagher and Donaldson to do any of the acts charged in the indictment, and if you find further to a moral certainty and beyond a reasonable doubt that any one of these parties did any of the overt acts alleged in the indictment, it will be your duty to find a verdict of guilty against the defendant on the trial before you.”

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

8. That the said District Court committed manifest error in giving to the jury the following charges, viz.: [27]

“You are instructed that it is not necessary that the conspiracy should be successful in order that the

defendant may be convicted. If you find from the evidence to a moral certainty and beyond a reasonable doubt that the defendant, Donaldson, who is now on trial, conspired with any of the other persons named in the indictment to commit any of the offenses charged therein, and that any one of the parties committed any overt act in furtherance of the conspiracy, it will be your duty to find the defendant guilty as charged."

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

9. That said District Court committed manifest error in giving to the jury the following charge, viz.:

"If upon consideration of all the evidence to which you have listened you are satisfied beyond all reasonable doubt that the defendant did engage in the conspiracy alleged in the Second Count or in the actual concealment of the opium alleged in the Fourth Count, then it will be your duty to return a verdict of guilty, notwithstanding the previous good character of the defendant."

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

10. That the said District Court committed manifest error in denying, refusing and overruling the defendant's motion for a new trial herein.

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law. [28]

11. That the said District Court committed mani-

fest error in denying, refusing and overruling the defendant's motion in arrest of judgment herein.

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

12. That the said District Court committed manifest error in sentencing the defendant ROBERT DONALDSON to imprisonment in the County Jail of the County of Alameda, State of California, for a period of one year and imposing upon him a fine of Two Hundred Dollars (\$200.00).

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

13. That the defendant ROBERT DONALDSON was not convicted herein by due process of law; all of which is to the great prejudice, damage and injury to his substantial rights.

14. That the verdict of the jury herein upon which the judgment against the defendant ROBERT DONALDSON was based is contrary to law and contrary to the evidence adduced at the trial of said ROBERT RONALDSON.

All of which is to the great prejudice, damage and injury to the substantial rights of said defendant ROBERT DONALDSON.

15. That the evidence adduced at the trial of the said defendant ROBERT DONALDSON herein was insufficient to support the said verdict of conviction or the said judgment [29] so rendered upon said verdict of conviction.

All of which is to the great prejudice, damage and

injury of the said petitioner and in violation of the rights conferred upon him by law.

16. That the evidence adduced at the trial of said defendant ROBERT DONALDSON on which the verdict of conviction against him was rendered and the judgment of conviction based consisted entirely of the testimony of accomplices, and by reason thereof the said District Court committed manifest error in refusing to give the following Instruction (No. 19) requested by the said defendant ROBERT DONALDSON, viz.:

“I charge you that the testimony of a co-conspirator or an accomplice ought to be viewed with distrust. You are to test its truth by inquiring into the probable motive which prompted it. You are to look into the testimony of other witnesses for corroborating facts. When it is supported in material respects you are bound to credit it, but where it is uncorroborated, you are not to rely upon it, unless after the exercise of extreme caution it produces in your minds the most positive conviction of its truth.”

Which ruling is to the great detriment, injury and prejudice of your petitioner and in violation of the rights conferred upon him by law.

WHEREAS, by the law of the land, said judgment ought to be given for said ROBERT DONALDSON, plaintiff in error, and against the UNITED STATES, defendant in error, and the said plaintiff in error, ROBERT DONALDSON, prays the judgment [30] to be reversed, annulled, and altogether held for nothing, and that he be restored to

all things which he hath lost by occasion of the said judgment.

FRANK R. SWEASEY,
CARL E. LINDSAY,

Attorneys for Said Defendant Robert Donaldson.

[Endorsed]: Filed Dec. 5, 1912. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [31]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 5,137.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT DONALDSON,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that on the 25th day of November, 1912, the above-entitled cause came on for trial before the above-entitled Court and a jury duly impaneled.

Hon. J. J. DE HAVEN Presiding. The plaintiff appearing by JOHN L. McNAB, United States Attorney, and BENJAMIN McKINLEY, Assistant United States Attorney, and the defendant appearing by FRANK R. SWEASEY and CARL E. LINDSAY; whereupon the following proceedings were had: [32]

[Testimony.]**[Testimony of David G. Powers, for the United States.]**

DAVID G. POWERS, called for the United States, sworn.

Direct Examination.

(By Mr. McNAB.)

Q. How old are you?

A. Twenty-five years, the day I was sentenced.

Q. Where do you live?

A. I live on London Street, between Brazil and Persia.

Q. How long a period of time did you serve in jail for the offense of obtaining and bringing in this opium? A. I served five months.

Q. Five months? A. Yes, sir.

Q. That was the period of six months less your credits for good behavior? A. Yes, sir.

Q. Do you know the defendant Donaldson?

A. Yes, sir.

Q. How long have you known him?

A. I have known him, I guess, for about—just before the fire, but not to talk to him; I have known him since the fire to talk to him.

Q. You know Henry Gallagher, the Customs Inspector? A. Very well.

Q. You and he are personal friends?

A. Yes, sir.

Q. What was your position during December, 1911, what were you doing?

(Testimony of David G. Powers.)

A. I was assistant to the superintendent of the Western Fuel Company.

Q. And what was your business on the waterfront?

A. I had charge of the Western Fuel discharging and loading ships with coal, and I had charge, superintended all the outside work, and charge of all this work, barge work and everything.

Q. What was Mr. Donaldson's position on board the steamships?

A. Mr. Donaldson was the assistant superintendent of the marine superintendent of the Pacific Mail Steamship Company.

Q. Had you seen him frequently prior to the time this controversy [33] came up? A. Yes, sir.

Q. Were you thrown in contact with him frequently in the ships? A. Yes, sir.

Q. During the month of December, 1911, did you have a conversation with Mr. Donaldson relative to the opium business? A. Yes, sir.

Q. Just briefly state to the jury what the conversation was.

A. Last December Mr. Donaldson approached me. I was over at Pier 42. I used to go over there quite frequently to find out from the assistant superintendent Donaldson when ships would be breasted off so we could put barges to them and discharge the coal. I met Mr. Donaldson, and Mr. Donaldson spoke to me very nicely, and he said: "Why don't you go into the hop business, Dave?" I says: "I don't care to go into that." "Gee," he says, "Look at the money that Hugh made and several others have made in the

(Testimony of David G. Powers.)

hop business." And he said, "You are foolish." Of course, I had my own troubles at that time. I consented afterwards; first, I refused, and then consented afterwards.

Q. What did you understand by the "hop business"? A. The opium business.

Q. Is that what the opium, the traffic in opium is commonly called on the waterfront?

A. Yes, sir. And he said that there were six hundred cans aboard the "Siberia," he said that over at Pier 44; so we walked over and went aboard the "Siberia," and Mr. Donaldson introduced me to Wong Tai, who was there.

Q. Do you recognize that as the Chinaman? (Indicating.)

A. Yes, sir. We went into the chief engineer's room, and Mr. Donaldson called the chief engineer's boy and the boatswain.

Q. When you say the chief engineer's boy, is that the China boy? A. Yes, sir.

Q. And the boatswain? A. Yes, sir. [34]

Q. All right, go ahead.

A. The conversation—we walked into the room that morning, I guess it was about 9 or 10 o'clock; I am not sure. The Chinaman says: "How much got left?" Mr. Donaldson said that. The Chinaman says: "Only three hundred sixty cans left." He says, "The Customs Inspector took the rest off last evening." And Mr. Donaldson says: "Will you get the rest off?" He says: "Let the inspector take the rest off; I want five dollars." He says: "You can

(Testimony of David G. Powers.)

have five dollars." And of that we were to get a quarter each on that because twenty-five per cent of it, he said, "Bill has to get."

Q. He didn't say who Bill was?

A. No, sir. Mr. Donaldson made the arrangements. He asked me at that time when I could take it. The barge "Melrose" was alongside, and I being employed with the Western Fuel Company for eleven years I knew just about to the hour how long it would take to discharge a barge.

Q. What did Mr. Donaldson say then as to who else, if anybody, had to share in the profits of this venture?

A. He told me that Mr. Gallagher would be—

Q. What Mr. Gallagher did he tell you?

A. Henry Gallagher.

Q. Had he known you and Henry Gallagher were friends?

A. I guess he must have known it. He told me to take Mr. Gallagher along with me, that everything was all right.

Q. What did he say about the division that had to be made between you?

A. The division was to be one-quarter—I was to get twenty-five per cent.

Q. Where was the other to go?

A. He said I had to have someone to help me—I said that; and he said it was a quarter to himself and a quarter to Mr. Gallagher; and that left one-half for Mr. Fiedler and I. I knew at that time I couldn't handle it by myself.

(Testimony of David G. Powers.)

Q. You knew you had to have somebody?

A. Yes, sir. [35] We had arranged to get it off the night before the barge was discharged—I should say, after the barge was discharged; and the night before the barge was discharged I went off the ship and I met Fiedler on the barge “Melrose” and I discussed with him about it at the time, and when I first spoke about it to Fiedler he refused, and then I urged him and he consented.

Q. What did you do finally?

A. Next day I went back to the boatswain’s room and we met the boatswain and the engineer’s boy again; and while we were in conversation with the boatswain and the chief engineer’s boy the name of Donaldson was brought up several times, as Mr. Fielder demanded to know who was dividing the money.

Q. What did you tell Mr. Fiedler as to how the money was to be divided?

A. It was divided in to four equal parts, to Mr. Donaldson, to Mr. Fiedler, Mr. Gallagher and I.

Q. How many cans of opium did you understand were to be brought over at first?

A. Three hundred sixty cans.

Q. Three hundred and sixty cans? A. Yes, sir.

Q. With whom did you leave the arrangements as to notifying the Chinaman? A. Mr. Donaldson.

Q. Did you have any further arrangements with Mr. Fiedler about the time of going over to the ship, or did you leave that to him?

A. That arrangement was made at the time we

(Testimony of David G. Powers.)

were in the room; and then afterwards Mr. Fiedler met the Chinaman again.

Q. Did Mr. Donaldson tell you where this opium was to go? A. He gave me the address.

Q. Where?

A. Wong Hugh, Seventh and Harrison, Oakland.

Q. Seventh and Harrison, Oakland?

A. Yes, sir.

Q. Had you ever heard of Wong Hugh before?

A. No, sir.

Q. Had you ever heard of him from anybody except Mr. Donaldson? [36]

A. No, sir, not before; but afterwards I heard about him when I was serving my sentence.

Q. Did you ever go back or did you board the "Siberia" to see the Chinaman in regard to the opium?

A. After that, no, I never spoke to them about it—yes, I did, I beg pardon. Next day, I did not go back to see him, but the Chinaman next day told me a day or so afterwards if I was on the barge, that the opium had been lowered over the sides and that there were three hundred and sixty cans.

Q. How many conversations did you have aboard the "Siberia" with the Chinaman?

A. One with Mr. Donaldson and one with Mr. Fiedler; and then there was one after.

Q. When did you next talk to Mr. Donaldson about the next step in the arrangement?

A. After the opium was off, I told Mr. Donaldson the opium was aboard the barge.

(Testimony of David G. Powers.)

Q. What arrangements, if any, were made as to where the opium was to be met?

A. It was to be met at Webster Street Bridge, Oakland.

Q. I mean in San Francisco?

A. Mr. Donaldson afterwards went over to Pier 42 and rang up a Chinaman, Soon Key.

Q. Were you present at the time he telephoned?

A. Yes, sir; in a little booth at Pier 42.

Q. What arrangements did he make with the Chinaman?

A. He made them for the Chinaman to meet me at First and Folsom.

Q. At First and Folsom? A. Yes, sir.

Q. Did you afterwards meet the Chinaman there?

A. Yes, sir.

Q. Was anybody—was there anybody present with him? A. No, he was alone.

Q. Did Mr. Donaldson meet you that evening?

A. Yes, sir. I forget just what time, but it was early. [37]

Q. Where did you next have anything to do with the opium?

A. After I had left the Chinaman, he told me he wouldn't go along with us but everything was all right, had been arranged; and I went down to Mission down by the front—I forget just the name of the street, and I met Mr. Gallagher; he was standing on one corner and Mr. Fiedler on the other.

Q. Where did you go?

A. Directly to the barge "Melrose" at Mission

(Testimony of David G. Powers.)

street, we went aboard the barge; and it seems that Mr. Fiedler didn't go aboard the barge, he wanted to get something to eat and he went for that, and Mr. Gallagher and I went on the barge and Mr. Fiedler came down afterwards.

Q. What did you do with the opium?

A. Mr. Gallagher kept watch while Mr. Fiedler and I lowered the opium over the side of the boat into the skiff or rowboat; and Mr. Fiedler rowed the boat over to Crowley's boat-house, Oakland; and Mr. Gallagher and I took the nickel ferry, the Creek Route and went over to Oakland.

Q. Before Mr. Fiedler left you what was the understanding between yourself, Mr. Gallagher and Mr. Fielder as to what Mr. Fiedler was to do?

A. He was to take us aboard the barge "Melrose."

Q. After you left the "Melrose"?

A. He was to go to Webster Street Bridge.

Q. At Oakland? A. Yes, sir.

Q. And when Mr. Fielder went off for Crowley's boat-house, Oakland, where did you and Mr. Gallagher go? A. The nickel ferry.

Q. Where did you go from there?

A. Right straight over to Oakland.

Q. Who arrived in Oakland first?

A. Mr. Fiedler.

Q. Mr. Fiedler? A. Yes, sir.

Q. Was he waiting for you when you arrived there? A. Yes, sir.

Q. Have the opium with him?

A. Yes, sir, it was in the boat. [38]

(Testimony of David G. Powers.)

Q. Just tell what took place after you arrived in Oakland.

A. We arrived in Oakland and waited quite a while for Wong Hugh but he didn't show up.

Q. By the way, you say that Mr. Wong Hugh didn't *say* up; what was the arrangement with regard to Wong Hugh?

A. Wong Hugh or someone representing him was to meet us and take the stuff.

Q. Who informed you that that arrangement was made?

A. Mr. Donaldson, and also the Chinaman that met us.

Q. The Chinaman that met you at First and Folsom? A. Yes, sir.

Q. Tell us what took place.

A. We arrived at the Webster Street Bridge and waited quite a while for the Chinaman to show up, but no Chinaman showed up; and I went over to Mrs. Wong Hugh's house, and Mrs. Wong Hugh would not let me in; so I went down and rang up this Chinaman who had met me at First and Folsom, I rang him up over the Home phone; and he said he would come over, but one of his children was sick but that he would come over. This Chinaman came over and met me at Seventh and Broadway, and then we went down to see Mrs. Wong Hugh and Mrs. Wong Hugh allowed us to come in when he talked Chinese to her. It was next door to some Chinese Native Sons or something like that.

Q. Did this Chinaman that met you at Seventh and

(Testimony of David G. Powers.)

Broadway go with you? A. Yes, sir.

Q. He did the talking?

A. Yes, sir. Then Mrs. Wong Hugh rang up for her son, and he didn't come. I knew I had lots to attend to the next morning and it was getting late and I told her that; and she said: "Here is five dollars; go down and get an automobile and bring the stuff up to the house." So I turned around and took the five dollars and went back to where Gallagher and Fiedler had been; and it seems that Mr. Fiedler had—

Mr. LINDSAY.—We object to that, the witness is giving his own [39] conclusion and opinion as to what may have happened.

The WITNESS.—No, sir, I'm not. I am telling you what I was told.

Mr. McNAB.—Q. Was Mr. Gallagher there when you got back? A. He was not there.

Q. Well, your knowledge as to why he had left is what the attorney is objecting to. At any rate, he was not there? A. No, sir.

Q. Mr. Fiedler was there? A. Yes.

Q. What did you and Mr. Fiedler do?

A. Mr. Fiedler and I then walked up to the saloon; I told him about everything. I says: "What has become of that fellow? He has cold feet." And I said that I had the five dollars from Mrs. Wong Hugh that I would ring up a taxicab or automobile and have the opium taken out to Mrs. Wong Hugh's residence. We went to the saloon, and there were some men there and a policeman or two, and we didn't

(Testimony of David G. Powers.)

want to ring up while they were in the saloon; and we walked back and Mr. Fiedler got impatient.

Q. In the meanwhile, where had you left the opium?

A. Still under the dock at the Webster Street Bridge.

Q. Was it dark?

A. Yes, sir, very dark. So Mr. Fiedler and I walked back. Mr. Fiedler got impatient and got a satchel of opium and started out, and I after him, and we were arrested.

Q. You say you were sentenced to six months in the county jail? A. Yes, sir.

Q. Mr. Fiedler got the same? A. Yes, sir.

Q. After you were in the county jail did Mr. Donaldson come to see you? A. Yes, sir.

Q. Before you served your sentence were you admitted to bail? A. Yes, sir. [40]

Q. Did Mr. Donaldson have any conversation with you during that period of time relative to whether or not you should talk?

A. Yes, sir. The first time I met Mr. Donaldson after I had been released from jail. I went to him and asked him about Mr. Fiedler's release. Mr. Donaldson said he didn't want to show his hand. I told him my father was willing to go half of the bail for Mr. Fiedler. Mr. Donaldson would not show his hand, he said.

Q. Did he make any promise to you at that time as to what he would do for you?

A. Yes, sir. He came to me and offered to give

(Testimony of David G. Powers.)

me a thousand dollars and would do everything for me. I told him I didn't want him to give me that, but to have him treat me decent when I got out of jail.

Q. About how often did he come to see you?

A. First time he came to see me—I was sentenced on the 3d of February, and he came to see me a week from the following Sunday.

Q. About how many times did he come all together?

A. He came every other week while I was in jail up to a few weeks before I went away.

Q. Was Mr. Fiedler in jail during that time?

A. Yes, sir.

Q. Did you and he have any conversations or intercourse during that time?

A. We met every day—we were both trustees after a week or so.

Q. Trustees? A. Yes, sir.

Q. Were you and Mr. Fiedler friendly during the time you were in jail? A. Yes, sir.

Q. I understand certain letters were written by Mr. Fiedler in jail? A. Yes, sir.

Q. That is the way in which your connection with these people was learned? A. Yes, sir.

Q. You were subsequently brought before the grand jury because of [41] those facts and brought face to face with them?

Mr. LINDSAY.—We object to that on the ground that it is irrelevant, incompetent and immaterial, not the best evidence, and the question calls for an act or declaration of one co-conspirator to the conspiracy.

(Testimony of David G. Powers.)

Mr. McNAB.—Withdraw the question. Take the witness.

Cross-examination.

(By Mr. LINDSAY.)

Q. How long had you been in the employ of the Western Fuel Company before December, 1911?

A. Around 10 and 11 years.

Q. At the time concerning which you have testified, namely, December, 1911, you were a sort of foreman of that institution?

A. I was considered assistant to the superintendent. I had charge of all the outside work. I was a foreman.

Q. Among your duties, as I understand your testimony, was that of superintending the loading of coal into these various ships? A. Yes, sir.

Q. And you had under you men who were in charge of certain barges?

A. And gangs; yes, sir.

Q. What is that? A. And working gangs also.

Q. And working gangs? A. Yes, sir.

Q. You did not yourself have direct control or charge of any particular barge, did you?

A. No, sir.

Q. This man Fiedler— A. Fiedler?

Q. What was his position?

A. He was captain of the barge, barge "Wellington."

Q. Captain of the barge? A. Yes, sir.

Q. He was under your control and direction?

A. Yes, sir.

(Testimony of David G. Powers.)

Q. What barge was he the captain of?

A. "Wellington," the barge [42] "Wellington."

Q. The barge "Wellington." Well, how long had you known Fiedler?

A. I have known Fiedler, I should judge, 5 years, or 4 years.

Q. Were you quite friendly with him at that time?

A. I have been friendly with all the men that have been working for me.

Q. I am talking particularly about Fiedler.

A. Yes, sir, I have been friendly with all the men working under me.

Q. And that includes Fiedler?

A. Yes, sir, all of them.

Q. He was that time captain of the barge "Wellington"? A. Yes, sir.

Q. Was the barge "Wellington" used at that time in carrying coal to the ship "Siberia"?

A. It had been used but not at that time.

Q. I am talking about that time. A. No, sir.

Q. This barge you speak of which was used by you in the transportation of this opium, what was the name of that barge? A. Barge "Melrose."

Q. "Melrose"? A. Yes, sir.

Q. Had the barge "Melrose" been in use in carrying coal to the ship "Siberia"? A. Yes, sir.

Q. Who was the captain of the barge "Melrose"?

A. His name was Christenson; I don't know his first name.

Q. Did you have Mr. Fiedler transferred from the

(Testimony of David G. Powers.)

barge "Wellington" to the barge "Melrose"?

A. No, sir.

Q. Well, he was so transferred, was he not?

A. No, sir, he wasn't transferred.

Q. How was it that Mr. Fiedler had control of the barge "Melrose" at the time you took this opium off this ship?

A. Fiedler did not have control of it. He just went aboard that evening received the opium while the other bargemen were uptown, perhaps going to the theatre or something of the kind.

Q. Who was in charge of the barge at the time?

A. Nobody at that [43] time but the captain and men supposed to be in control.

Q. Where was he?

A. Uptown, I presume, going to the theatre or meeting some friends, I presume.

Q. Wasn't somebody supposed to be on that barge at that time? A. Not according to my orders.

Q. According to your orders the barge might lie there unattended?

A. Yes, sir. I believe in men going out for a little recreation. I don't believe in men working day and night.

Q. That is true, you have told us that; and that is the reason for that barge being unattended by anyone at that time? A. Yes, sir.

Q. That is the only one? A. The only reason.

Q. Is it not a matter of fact that you told the men who were in that barge or on that barge to leave?

A. No, sir.

(Testimony of David G. Powers.)

Q. Gave them express permission to go away?

A. No, sir. I have always told every man on every job that I have ever had yet that when his day's work was done he could go uptown and go wherever he cared to go.

Q. I am talking about that particular job.

A. No, sir.

Q. On that particular job on that particular evening, did you not give the men particular permission to leave the barge? A. No, sir, I did not.

Q. How did you know that the barge was unattended?

A. I have been down there so long I know the business. I know very well the men go out every evening, I know how long they work.

Q. Did you know at that time there was actually nobody on there?

A. No, sir. That was the only barge alongside the "Siberia" and the only barge we could depend to put the opium on.

Q. And when you and Gallagher and Fiedler went there and went aboard that barge—

A. (Interrupting.) Gallagher did not go aboard that [44] barge.

Q. Then I misunderstood you. I thought you said you and Gallagher went aboard the barge, and Fiedler went some place to get something to eat.

A. No, sir.

Q. Correct that.

A. I said that Gallagher, after the opium had been placed aboard the barge, went down on Mission

(Testimony of David G. Powers.)

Street, and then I went aboard the barge, and Gallagher. Mr. Fiedler then went to Oakland. The barge was at Pier 42.

Q. After it had been towed? A. Yes, sir.

Q. Did you give orders that the barge be towed to Pier 44?

A. The barge was alongside Pier 44, alongside the steamer.

Q. The steamer "Siberia"? A. Yes, sir.

Q. Was Mr. Gallagher aboard the barge during the time she was lying alongside the "Siberia"?

A. No, he was not, to my knowledge.

Q. When he was aboard the barge it was at some other position? A. Yes, sir.

Q. What position?

A. Mission Street Wharf, alongside the bunkers.

Q. How did it get there? A. Towed by a tug.

Q. How did it get there?

A. Under orders from the "Melrose."

Q. Who was captain of the barge at that time?

A. Mr. Christenson.

Q. At that time the opium was aboard the barge?

A. Yes, sir.

Q. How long have you known this boatswain?

A. In my business I met all the boatswains. I have met him from time to time, I guess, in the last 10 years. Really, I don't remember how long I have known him.

Q. In December, 1911, at the time you say you were introduced to him by the defendant, Donaldson, you were very well acquainted with the boatswain, were you not?

(Testimony of David G. Powers.)

A. No. The Chinamen looked alike to me. At that time I knew who he was but didn't know his name. [45]

Q. Do I understand you as wishing to say that at the time you speak of you were not acquainted with this boatswain?

A. I would say I knew the man, perhaps, to say, "Hello," to him.

Q. You did know him?

A. I explained to you, in that way.

Q. You knew him from the other Chinamen?

A. No, sir.

Q. You knew his name? A. No, sir.

Q. You knew he was the boatswain of the "Siberia"?

A. Certainly, anybody could see that that saw him.

Q. Your duties were such as would call you aboard the ship frequently? A. Yes, sir.

Q. And had been on the "Siberia" many times before? A. Yes, sir.

Q. Many times you had seen this boatswain on board that ship? A. Yes, sir.

Q. And you knew perfectly well he was the chief boatswain of the "Siberia," didn't you?

A. Certainly.

Q. And many times you had spoken to him before that?

Mr. McNAB.—We object to that on the ground that it has been gone over three or four times. I do not desire to interrupt, but I think we might make a little better speed.

(Testimony of David G. Powers.)

Mr. LINDSAY.—Well, I am through with that part of it.

Q. Had you ever met the engineer's cabin boy before the time you speak of?

A. I don't know the engineer's cabin boy. What do you mean—the chief engineer's boy? No, I never seen him.

Q. Never saw him before? A. No, sir.

Q. You have known Mr. Donaldson since the fire?

A. Yes, sir. I knew him by sight before, after the fire I came to talk to him.

Q. Up to the time of this trouble when you were arrested and sentenced to jail, had he and you always been friends?

A. Well, we would pass one another on different occasions and I would say, "Good [46] morning,"—just passing by.

Q. No particular friendship between you?

A. No, sir; no particular friendship between us in any way.

Q. He was assistant superintendent for the steamship?

A. For the Pacific Mail Steamship Company; yes, sir.

Q. At the time of this conversation of which you have spoken, you were not particularly intimate with him?

A. No, sir; just would pass me by, and we would just stop and talk a few minutes on a business proposition; that is all.

Q. Could you fix about the date when you had this

(Testimony of David G. Powers.)

conversation with him on the pier you speak of—
Pier 42, I think?

A. I think that was about, if I am not mistaken, on Saturday morning, in December; I don't remember the date. I won't say the date because I don't remember; but the ship, I think, arrived on Friday afternoon or Friday morning, and I think Mr. Donaldson met me on Saturday morning, I believe, or on a Sunday morning—I believe it was on Sunday morning, for we were working the "Siberia," that Mr. Fiedler and I, if I am not entirely mistaken, met the boatswain and chief engineer's boy.

Q. Sunday morning? A. Yes, sir.

Q. If the "Siberia" came in on Friday you probably met Donaldson, as you say, the next day?

A. Yes, sir.

Q. And the following day you and Fiedler met the boatswain? A. Yes, sir.

Q. It was a fact, as I understand you, that on Sunday, or at any rate on a day subsequent to this talk with Mr. Donaldson, you and Mr. Fiedler alone met the boatswain?

A. Yes, sir, we met them afterwards.

Q. And had a talk with him? A. Yes, sir. [47]

Q. Mr. Donaldson wasn't there at that time?

A. No, sir.

Q. When were you sentenced to be imprisoned in the County Jail?

A. My birthday; that was February 3d.

Q. Were you tried, or did you plead guilty?

A. I plead guilty.

(Testimony of David G. Powers.)

Q. At that time, what were your feelings towards Mr. Donaldson? A. Very friendly.

Q. Very friendly? A. Yes, sir.

Q. I understood you that before this conversation on Pier 42 you had merely a bowing acquaintance with him, is that correct?

A. Friendly acquaintance, certainly.

Q. Then after you had this talk about the smuggling, and these events happened, and you were sentenced to jail, went to jail, then your feelings were very friendly?

A. He had been in with me, and I thought Donaldson was made of the same stuff as I was; but I found out later he wasn't.

Q. You thought he was made of the same stuff you were, but you found out later he wasn't?

A. Yes, sir.

Mr. McNAB.—Q. What do you mean by that?

A. I mean that I thought Mr. Donaldson was a friend of mine on account of being in with me, and afterwards turned around and had no use for me.

The COURT.—Instead of going into these details, the real question here is: What are the feelings of the witness at the present time, not what they were; that doesn't make so much difference about that. The question is: What are they now?

Mr. LINDSAY.—Q. What are your feelings toward Mr. Donaldson now? A. Friendly.

Q. Friendly at this time? A. Yes, sir.

Q. I thought you said your feelings toward him had changed? A. Not to a great extent. [48]

(Testimony of David G. Powers.)

Q. During the time that you were in jail you knew, then, did you, as well as you know now, that Donaldson had first suggested this matter to you?

A. Certainly.

Q. When did you first speak of this to anyone?

A. Speak of which?

Q. Of Mr. Donaldson's complicity of this matter you have said.

A. I spoke of it at the time Mr. Fiedler and I—when I met Mr. Fiedler and I asked him to go into the opium business with me, it was the next day.

Q. After your conversation, when did you first tell anyone that Mr. Donaldson was interested in this matter? A. I have told Mr. Tidwell.

Q. Who is Mr. Tidwell?

A. United States Special Agent, I think treasury agent.

Q. Was that before or after you got out of jail?

A. That was after I got out of jail.

Q. Where did you tell him, in what place?

A. In the Custom-house.

Q. Did you go to him or did he come to you?

A. I went to him.

Q. You went to him? A. Yes, sir.

Q. And you told him this story you told here, did you? A. Yes, sir.

Q. What is your business now? A. Nothing.

Q. Have you been in the employ of the Government in any capacity since you came out of jail?

A. Yes.

Q. What capacity? A. As custom's agent.

(Testimony of David G. Powers.)

Q. Are you a custom's agent now? A. No, sir.

Q. When did you cease to be a custom's agent?

A. The other day.

Q. What day? A. Saturday.

Q. Last Saturday? A. Yes, sir.

Q. When do you expect to be a custom's agent again?

A. I do not expect to be a custom's agent again.

[49]

Q. When were you appointed custom's agent?

A. I don't remember the date.

Q. By whom?

A. By the Treasury Department at Washington.

Q. Mr. Tidwell, did he have anything to do with it? A. Something; yes, sir.

Q. On his recommendation? A. Yes, sir.

Q. Was it before or after you told Mr. Tidwell this story about Mr. Donaldson? A. It was before.

Q. You went to Mr. Tidwell and you told him what you have told here and afterwards were appointed custom's agent? A. Yes, sir.

Q. You say Mr. Donaldson came to see you while you were in prison in the County Jail at Alameda?

A. Yes.

Q. Before his first visit to you had you communicated with him in any way?

A. Mr. Donaldson came over to me the first time after I had been in jail.

Q. Before he came had you written to him?

A. No, sir.

Q. Did you write to him at all?

(Testimony of David G. Powers.)

A. I did write to him under his suggestion, but Mr. Donaldson dictated that letter—you have it there—so he wouldn't have to show his hand.

Q. I will ask you: While you were in the County Jail, while you were imprisoned in that County Jail, you wrote this letter? Look at it.

Mr. McNAB.—We object to counsel's suggesting. I don't know what it is.

Mr. LINDSAY.—It is self-evident.

(Mr. Lindsey hands letter to witness.)

The WITNESS.—I wish you would read it, too.

Mr. LINDSAY.—Q. Is this letter in your writing?

A. I wrote it.

Q. The letter is to Mr. Donaldson.

A. I did, at his suggestion; [50] and he told me to write him as strong a letter as I could so that he wouldn't have to show his hand.

Mr. LINDSAY.—I will offer this letter in evidence.

The COURT.—Are you through with the cross-examination?

Mr. LINDSAY.—With the exception of this letter which I have introduced in evidence.

Mr. McNAB.—We offer no objection; it may be read to the jury as far as we are concerned.

The COURT.—Do you desire to read it now?

Mr. McNAB.—If you wish to ask the witness the circumstances under which it was written, I am familiar with it.

Mr. LINDSAY.—We will read it now.

(Mr. Lindsay read Defendant's Exhibit No. 1, which is as follows:)

Defendant's Exhibit No. 1.

Alameda Jail, Feb. 1912.

Mr. Robert Donaldson:

Dear Friend: I write you asking a great favor, one that I will not forget until the day I go to my grave.

It may seem foolish to you, for me to ask such a great favor which I would not do, if it was not necessary.

I want you to see if you can in any way have President William H. Taft, pardon or grant me a parole.

I have worked for eleven years for Mr. Frederick Mills of the Western Fuel Co., and have been on board the Pacific Mail Company Steamers every day they have been in port, and have never been in trouble before in my life.

I made a mistake when trouble was staring me in the face, which was the first time I even saw a can of opium. I was caught in Oakland by a police officer and on being searched found nothing on me besides the opium. I offered no resistance but walked to the patrol box with the officer. [51]

I have always been good up until this time, trying in every way to assist the custom's officers, and discharging a barge-man of the Western Fuel Co. for having opium in the barge.

Mr. Joseph Head, Mr. Joseph Wilson, Mr. James Nealon, all old employees of the United States Customs Service and Mr. Frederick Mills of the Western

(Testimony of David G. Powers.)

Fuel Company, Mr. Joseph Herald, Real Estate broker and Judge Charles Crichton of the Justices Court of San Francisco testified too my good character.

I have always helped my dad by giving him half my wages every month and tried to treat everybody nice.

I would not have been in this trouble had not other troubles been staring me in the face and I did not want to ask my old dad for assistance as he had a mortgage on his property and also had to help my sister, her husband and baby, as he has consumption and is unable to help his family very much.

I have learnt a good lesson and promise you that I will never cause anybody trouble and give you my word of honor that this is my first offense and that I done it to start a little home.

Thanking you in advance for any favors,

I remain,

Yours truly,

DAVID G. POWERS.

Redirect Examination.

(By Mr. McNAB.)

Q. Explain to the jury who made you write that letter, and under what circumstances.

Mr. LINDSAY.—We object to that as not proper redirect, and as assuming something not in evidence, and leading.

The COURT.—I will permit the question. The witness has already testified at whose suggestion he wrote it and so on.

(Testimony of David G. Powers.)

Mr. McNAB.—What were the reasons he gave you? [52]

A. Mr. Donaldson told me he wanted to help me—I told him I wanted him to help me; and he said he didn't want to show his hand, he says, "I am up against it." "Gee whiz," I says, "here I am in jail. I want to get out. I was never in jail before in my life." He says: "You write me a letter, and write and thank me for all past favors, and so forth; tell me what a fix you are in; lay it on good, and tell what a good friend I have been to you, and everything." And he said to tell the truth, write the letter, and I will show it, and do all I can for you.

Q. You informed us of that long ago?

A. Yes, sir.

Mr. LINDSAY.—I move to strike out both the question and answer.

The COURT.—Let it stand.

Mr. McNAB.—Q. Mr. Tidwell never spoke to you about this matter until he sent for you after having seized these letters that had gone out from the jail which disclosed Mr. Donaldson's connection, did he?

Mr. LINDSAY.—We object to that on the grounds that it is immaterial and irrelevant, not redirect, is leading, and is based on something that is not in evidence—there is nothing here about letters being seized.

The COURT.—I will overrule the objection.

The WITNESS.—What was the question?

(Question read by Reporter.)

A. No, sir.

(Testimony of David G. Powers.)

Mr. LINDSAY.—Note our exception.

Mr. McNAB.—Q. And it was only after he had this positive information in these letters relating to Mr. Donaldson and Mr. Gallagher that he ever sent for you at all?

Mr. LINDSAY.—We object to that on the same grounds.

The COURT.—The objection will be overruled.

Mr. LINDSAY.—Except. [53]

A. Yes, sir.

Mr. McNAB.—Q. You said that you had been put on as a custom's agent? A. Yes, sir.

Q. You were detailed, were you not, for the purpose of trying to get on the inside of those who were smuggling? A. Yes, sir.

Q. And to use whatever information you could obtain to stop it? A. Yes, sir.

Mr. McNAB.—That's all.

Mr. LINDSAY.—Q. And I suppose you have been trying to make good in that regard, have you?

A. In every kind of way that was square and honest, not a crooked way.

Mr. LINDSAY.—That's all.

Mr. McNAB.—That's all.

[Testimony of K. E. Fiedler, for the United States.]

K. E. FIEDLER, called for the United States, sworn.

Direct Examination.

(By Mr. McKINLEY.)

Q. You reside in San Francisco?

A. Yes, sir.

(Testimony of K. E. Fiedler.)

Q. You gave your name as K. E. Fiedler. You are also known as Emil Fiedler?

A. Karl Emil Fiedler is my full name.

Q. You live in San Francisco? A. I do.

Q. What position do you occupy with the Western Fuel Company—what position did you occupy with the Western Fuel Company in the month of December, 1911? A. I was barge-keeper.

Q. Did you know the last witness who was on the stand, Mr. Powers, at that time? A. I did.

Q. Had you known him a long time before that?

A. I knew him for 4 years.

Q. Four years before that time at least?

A. I knew him since December, 1906, when I first took charge of the barge. [54]

Q. And had some business dealings with him as barge-keeper? A. Yes, sir.

Q. Did you have any conversation with Mr. Powers some time during the month of December of last year, 1911, in reference to engaging in the opium business? A. I had.

Q. Will you fix the date of that conversation?

A. I can't tell the date exactly.

Q. Well, nearly.

A. It was the first part of December; if I am right, it was about the 4th or 5th of December, before I got arrested.

Q. All right; that is close enough. State where that conversation took place and what it was.

A. Pier 44 alongside of the barge; and I approached Mr. Powers for oil, machine oil; and he

(Testimony of K. E. Fiedler.)

asked me then, he says: "Emil, will you go in the business with me?" He says: "We have a chance to make a few dollars and it looks good." So he told me what it was. I refused to go into it at first; but when he told me who was in it it looked easy to me.

Q. Did he tell you what business he wanted you to go into? A. He did.

Q. What was it? A. Opium.

Q. You say that when he told you who was in it it looked good to you. What did he tell you about that?

A. He told me at that time the money was to be divided up into four equal parts; he didn't give me the names of those who were in it at that time.

Q. That was on Pier 44? A. 44.

Q. Give us all the rest of that conversation that you can recall.

A. I said to him: "Well, Dave, I don't think I can go into it." And he talked to me; and at last I consented and says: "All right." So he said: "All right; meet me to-morrow morning and I will give you an introduction to the parties."

Q. Did he tell you on that occasion on Pier 44 just what was the work that was to be done? Did he give you particulars at that time?

A. Yes; that I had to take it off the ship and hide it in the barge. [55]

Q. He told you that? A. Yes, sir.

Q. All right. Then you made arrangements to meet him the next morning?

A. Yes, sir, I did meet him the next morning.

(Testimony of K. E. Fiedler.)

Q. State what happened then.

A. If I am right, it was on Sunday morning, and I met him during the forenoon.

Q. That first conversation was on Saturday, then?

A. I think it was on Saturday; either Saturday or Friday. I am not sure.

Q. All right. Go on; you met him on Sunday morning?

A. I met him on Sunday morning and he took me on board of the ship "Siberia," in to the chief engineer's room, where he introduced me to a man sitting there.

Q. What was his position on the "Siberia"?

A. First boatswain.

Q. That is one of the Chinese who is in the court here?

A. Yes, sir. He introduced me to the first boatswain and also to the chief engineer's boy; they were both in the chief engineer's room.

Q. There were you and Mr. Powers and the chief engineer's boy and the Chinese who is here, the boatswain, in the room?

A. Yes, sir. And the boatswain and Powers had a conversation—I was introduced—and they had a conversation which I overheard in which Mr. Donaldson's name—

Q. (Interrupting.) What was that conversation?

A. He introduced me and says: "This is the man that will get the stuff off and you can make a date with him whenever it will be ready and he will let me know and the barge will be discharged and he can

(Testimony of K. E. Fiedler.)

see you about it.” So after—

Q. (Interrupting.) Hold on. You haven’t told us that conversation; you said something about Donaldson’s name being mentioned. Tell about that, who mentioned it.

A. I overheard the name of Donaldson and also of Henry Gallagher.

Q. Who said anything about Donaldson or Gallagher?

A. It was mentioned by Powers and the boatswain. [56]

Q. Give us that part of the conversation, if you remember it.

A. I am not positive about how it was; but from my knowledge the boatswain says: “Is Donaldson all right?”

Mr. LINDSAY.—Q. Tell what you know.

A. That was about all: “Is Donaldson all right?”

Mr. McKINLEY.—Q. Let me refresh your memory to this extent: Did you make any inquiries at that time as to who was going to divide this money?

A. I did. I inquired from Powers and he told me there were four parties.

Q. He told you that in this conversation you speak of?

A. Yes, sir; he told me, and that was at that time.

Q. What names did he give you?

A. He says: “Henry Gallagher and a man by the name of Bob Donaldson, who is assistant superintendent of the Mail Dock, and you and I; that is four.

Q. Mr. Donaldson was mentioned in that connec-

(Testimony of K. E. Fiedler.)

tion? A. In that connection.

Q. And you heard the boatswain ask if Donaldson was all right? A. I did.

Q. And Powers replied to that, did he?

A. He did.

Q. Have you given us all you can remember about that conversation?

A. Yes, sir, all. And Sunday morning—

Q. And it was arranged that arrangements were to be made whereby the boatswain was to lower that opium over the side and you were to know when it was to be done?

A. Yes, sir, I did; on Tuesday night.

Q. Was anything said about how many tins were on the ship? A. No, I never heard about that.

Q. Not in that conversation? A. No.

Q. Was any statement made in that conversation as to what the price per tin was going to be?

A. No, sir. [57]

Mr. LINDSAY.—We object to that on the grounds that it is leading and suggestive.

Mr. McKINLEY.—He answered no anyway.

Q. You left the ship after that conversation. What was the next thing that happened?

A. I went on board the ship Tuesday night; that was after Powers told me the barge would be empty about Wednesday morning.

Q. What barge was that? A. "Melrose."

Q. That was the barge you had charge of?

A. No, I had charge of the barge "Wellington," at that time it lay at anchor in the bay. I went

(Testimony of K. E. Fiedler.)

aboard the ship on Tuesday night and met the boat-swain and asked him if everything was ready. He said: "All right." The stuff was lowered over the side and I was working the rope and lowering it down in the barge and putting it in the water-tank.

Q. By the stuff you mean the opium?

A. The opium. The next day went from alongside the ship to Pier 44; laid there a day; and from there towed down to Mission Street Dock.

Q. It was there one day before it was towed to the Mission Street Dock?

A. Yes, sir, on the south side of 44.

Q. And you had that opium in an unused water-tank? A. Yes, sir.

Q. All right.

A. After the barge was down at Mission Street Dock I met Powers, also Gallagher, between Mission and Market, and was introduced to Mr. Gallagher.

Q. That is Henry Gallagher?

A. Henry Gallagher, the Custom's House man.

Q. Go on.

A. Powers and Gallagher went down on board the barge down Mission Street Dock, and I went down Market Street for my supper; after that I met Gallagher and Powers on board the barge.

Q. Aboard the barge at what time?

A. About 7 o'clock.

Q. Did you have any conversation then at that time? Go on. [58]

The COURT.—I don't think it is necessary to go into that.

(Testimony of K. E. Fiedler.)

Mr. McKINLEY.—I want the witness to go on in his own way.

The WITNESS.—I didn't have much of a conversation; just to have them say: "Hurry up; get your supper so as to get off with this." After that I went on board the barge, took a suit-case on board the barge, and met Powers and Gallagher on board the barge. Then I picked up some of the packages of opium and placed them in the suit-case. I left all three packages the way they were, packed them up, and lowered them down in the boat. Henry Gallagher stayed on the deck of the barge, Powers and I went into the hold, where I had the stuff packed, and then we lowered it in the boat, and Powers and Gallagher left me at that time and went over to the ferry, and I rowed the boat over to Crowley's boat-house and hired a launch to tow me across to Oakland. It took us about three-quarters of an hour, and arrived at Oakland at 10 minutes past 8. I waited there until Powers and Gallagher met me at the Webster Street Bridge at about half-past nine, or after nine—between nine and ten. At that time Powers told me he couldn't get the Chinaman, that he was in jail. So I says: "Well, what are we going to do?" He says: "Just wait a little while." We then had a drink together, and Powers and Gallagher left me for about ten minutes and Gallagher came back. We had the stuff concealed there under the wharf, and Gallagher stayed there a while, and I went up into Oakland. I came back about half-past

(Testimony of K. E. Fiedler.)

eleven. Gallagher was gone; and I met Powers about 12 o'clock.

Q. Gallagher was alone? A. No, he was gone.

Q. Gone?

A. He had left. I met Powers about 12 o'clock, and he told me he received five dollars to hire an automobile. We then went into a saloon; he was going to ring up for an automobile, but [59] on account of the people being in there he didn't ring up. So I got kind of leary about this, so we went and got the suit-case and took it out of the boat and after we had gone about two blocks we were held up by an officer and arrested.

Q. When was it you made your first inquiry as to who was in on the divy?

Mr. LINDSAY.—We object to that on the grounds that it is leading, suggestive.

The COURT.—The objection will be sustained.

Mr. McKINLEY.—That is all.

Cross-examination.

(By Mr. LINDSAY.)

Q. Are you acquainted with defendant, Mr. Donaldson?

A. Not personally; know him by name, that is all.

Q. Did you ever speak to him in your life?

A. I did not.

Q. At the time you had this little smuggling episode with Mr. Powers you weren't acquainted with Mr. Donaldson at all?

A. Not personally; I knew him by name, knew who he was.

(Testimony of K. E. Fiedler.)

Q. The only time you heard his name mentioned was when the Chinaman asked Powers if Donaldson was all right?

A. No, I heard Mr. Donaldson's name mentioned two or three years ago; but that was none of my business.

Q. But in connection with this affair, that was all you heard about Donaldson? A. Yes.

Mr. LINDSAY.—That's all.

Mr. McNAB.—I think we are entitled to have the jury understand the order in which these conversations took place. (Addressing the witness.) You said that is the only time the Chinaman spoke about it; what do you mean, in regard to your conversations with Powers?

Mr. LINDSAY.—We object to that—it is not re-direct, and he has not said nor testified that at any time when he talked to Mr. Powers Mr. Donaldson's name was mentioned. [60]

The COURT.—I will sustain the objection. The witness has gone into this matter very fully, and we will know no more about it if we spend a half hour on these immaterial matters.

Mr. McNAB.—Very well; we believe the jury fully understands.

Mr. LINDSAY.—We object to the District Attorney's remark.

[Testimony of Yung Tai, for the United States.]

YUNG TAI, called for the United States, sworn.

DAVID G. JONES, sworn as interpreter.

Direct Examination.

(By Mr. McNAB.)

Mr. McNAB.—This defendant is under indictment; but his counsel states that he is willing to make his statement, and I put him on the stand as such.

Mr. LINDSAY.—If there has been any preliminary understanding between the Government and counsel for this defendant, I ask as to what conditions are under which he testifies. The defendant requests that such understanding be made known if there is such an understanding.

Mr. McNAB.—There is absolutely no understanding at all. I told the attorney for this defendant that I proposed to put this defendant on the stand if he would talk; he said he is willing to go on the stand and talk; he is going to tell what he says is the truth and he is going to take the consequences. There is no understanding from me; we do not buy testimony.

Q. Your name is Yung Tai? A. Yes, sir.

Q. Were you the chief boatswain of the steamship "Siberia" in December, last? A. Yes, sir.

Q. You were the chief boatswain, were you?

A. Yes, sir.

Q. Do you know Mr. Donaldson, this man? (Indicating.)

A. I know he is assistant superintendent. [61]

Q. Did this man Donaldson in December come to

(Testimony of Yung Tai.)

you on the ship with this man Powers? (Indicating both parties mentioned.) A. Yes, sir.

Q. About what time of the day did he come to you?

A. Sunday. 1 o'clock.

Q. Is that the man? (Indicating.)

A. Yes, sir.

Q. He came to you with Mr. Donaldson, this man? (Indicating.) A. On the saloon deck.

Q. What did they say to you on the saloon deck?

A. They came over on Sunday, the second superintendent and the coalman.

Q. By the second superintendent do you mean this man Donaldson sitting here? (Indicating.)

A. Yes, sir.

Q. By the coalman, do you mean this man that just rose up, Mr. Powers? (Indicating.) A. Yes.

Q. Just tell what they said.

A. The chief engineer's boy told me that those men had come to see me.

Q. Did Donaldson say anything to you?

A. Yes.

Q. What did he say?

A. On the saloon deck they said: "That man is a good man."

Q. What did Mr. Donaldson, the man you call the second superintendent, say to you?

Mr. LINDSAY.—I understand that is just what he answered. We object.

The COURT.—I overrule the objection.

A. He said: "That coalman is a good man."

Mr. McNAB.—Q. Did he say anything at that

(Testimony of Yung Tai.)

time about opium?

Mr. LINDSAY.—We object to that on the grounds that it is leading and suggestive.

The COURT.—The objection will be overruled.

Mr. LINDSAY.—We except.

A. Yes—to give him the opium, “He is a good man.” [62]

Mr. McNAB.—Q. Who said that?

A. The second superintendent. I don’t know his name.

Q. This man? (Indicating the defendant.)

A. Yes.

Q. What else did they say to you?

A. He says: “You give it to him; he is a good man; the second superintendent will guarantee or bail.”

Q. Tell everything that was said there.

A. I says: “I have no opium to give you.”

Q. Did they talk to any other Chinaman there at that time?

Mr. LINDSAY.—We object to that on the grounds that it is immaterial, irrelevant and incompetent and not within the issues.

The COURT.—The objection will be overruled.

Mr. LINDSAY.—Except.

A. I don’t know.

Mr. McNAB.—Q. What else took place, if anything, at that particular time? A. I went to work.

Q. While this conversation was going on, did Mr. Donaldson say anything further to you about this matter or about what was going on on the deck?

A. Yes. We were on the saloon deck, this man

(Testimony of Yung Tai.)

Donaldson and I; and he says: "Not give it to that man; give it to me."

Q. Did the coalman, Powers, and any other man come back to see you after this interview?

A. The superintendent came to see me.

Q. And what did he say to you?

A. The second time he said: "Not give it to him, give it to me—the opium." There were people then moving about and then there was no talk about opium. We were then near the stoke-hold.

Q. What did Mr. Donaldson, the man you call the second superintendent, what did he say, if anything, about where he could put the opium?

Mr. LINDSAY.—We object to that on the grounds that it is leading and suggestive. [63]

The COURT.—The objection will be overruled.

Mr. LINDSAY.—We except.

A. He told me to put 150 cans here.

Mr. McNAB.—Q. Where?

A. Inside the stoke-hold.

Q. Who told you to do that?

A. This man here, the second superintendent.

Q. You mean this man right here? (Indicating.)

A. Yes, sir.

Q. Did this man on the coal barge—Powers—come back afterwards—did these men come back to you afterwards? (Indicating.)

A. About 4 o'clock, and I told them I didn't have any; I told them I didn't have any.

Q. Now, how long after that conversation you had with Mr. Donaldson about the stoke-hold was it that

(Testimony of Yung Tai.)

Mr. Powers and Mr. Fiedler, these other two men, came back to see you? A. Came to my room.

The COURT.—I think we will suspend until 2 o'clock. Gentlemen, be here promptly at two.

November 25, 1912, Monday, 2 o'clock P. M.

The COURT.—Call the roll.

(The jury-roll was called.)

The CLERK.—All present, your Honor.

The COURT.—Proceed.

Mr. McNAB.—I don't see the witness in the courtroom.

The COURT.—Get some other.

Mr. McNAB.—That is our last witness, your Honor.

(At this stage of the proceedings, Yung Tai came into the courtroom.)

YUNG TAI, recalled.

Mr. McNAB.—Q. I simply wanted to ask you, Yung Tai: In this last conversation you had with Mr. Donaldson, or the first one, state whether or not he said anything to you about guaranteeing you [64] with the payment of any opium you turned over.

Mr. LINDSAY.—We object to that; it is leading and suggestive.

The COURT.—I overrule the objection.

Mr. LINDSAY.—We except.

A. He said: "If you give the opium to me I will guarantee you the payment."

Mr. McNAB.—Take the witness.

(Testimony of Yung Tai.)

Cross-examination.

(By Mr. LINDSAY.)

Q. How long have you been chief boatswain on the "Siberia"? A. Two years.

Q. In December, 1911, did you have opium on the "Siberia"? A. No.

Q. Did you tell Mr. Powers, the coalman, that you had any opium, would give him any opium?

A. No.

Q. Did you give him any opium? A. No.

Q. Did you tell Mr. Donaldson or anybody else that you would give them opium to take ashore?

A. No.

Q. Did you enter into any agreement with Powers or Donaldson to smuggle opium ashore?

A. They came and asked me, but I made no promises.

Q. Did you have any opium at all anywhere to let them have? A. No.

Q. You are under indictment now for smuggling, are you not?

The INTERPRETER.—He does not seem to understand the word smuggling. I will put it, "Under arrest."

Mr. McNAB.—Very well.

(The question was so put by the Interpreter.)

A. They haven't arrested me.

The INTERPRETER.—I don't know that he clearly understands the question. [65]

Mr. McNAB.—Oh yes, he is under indictment.

(Testimony of Yung Tai.)

Mr. LINDSAY.—Q. They keep you in jail now, do they not? A. Yes.

Q. What for—do you know? A. I don't know.

Q. Do you know Mr. Tudwell, who is connected with the Government service?

A. I don't know what man he is.

Q. You never saw him before?

A. Yes, I might have seen him.

Q. Did Mr. Tudwell come to see you in jail and talk to you?

A. I don't know. People did not come to see me.

Q. Did anybody come to see you in jail and talk to you about this case? A. No.

Q. Did you put any opium from the "Siberia" into the stoke-hold of the "Siberia," or on a barge alongside the "Siberia," or anywhere else? A. No.

Mr. LINDSAY.—That is all.

Mr. McNAB.—That is all. That is the Government's case, your Honor.

The COURT.—Proceed with the case for the defense.

(At this point, Mr. Sweasey asked for an instruction of the Court to bring in a verdict for the defendant upon the first and third counts of the indictment, stating his grounds for the motion. The motion was granted.)

Mr. McNAB.—If your Honor please, I forgot to prove one fact. I don't think it is essential, it has been proved, but I want to strengthen it.

The COURT.—Very well.

[Testimony of Joseph Head, for the United States.]

JOSEPH HEAD, called for the *United*, sworn.

Direct Examination. [66]

(By Mr. McNAB.)

Q. Did you bring this opium over from Oakland after it was captured? A. Yes, sir.

Q. Was it regular unstamped cans?

A. Yes, sir.

Q. Regular opium cans? A. Yes, sir.

Q. How many cans were there? A. 320.

Q. Opium that is a regular unstamped opium, prepared for smoking? A. Yes, sir.

Mr. McNAB.—That is all. That is our case.

**[Testimony of Robert Donaldson, in His Own
Behalf.]**

ROBERT DONALDSON, called in his own behalf, sworn.

Direct Examination.

(By Mr. LINDSAY.)

Q. Your name is Robert Donaldson? A. It is.

Q. Where do you live, Mr. Donaldson?

A. 829 Dolores.

Q. In this city and county? A. It is.

Q. How long have you resided here?

A. I was born here.

Q. Have you lived here all your life?

A. I have, practically, all my life.

Q. What is your business?

A. Assistant superintendent of the Pacific Mail Steamship Company.

(Testimony of Robert Donaldson.)

Q. How long have you been connected with that company? A. Since 1908.

Q. 1908? A. Yes, sir.

Q. All the time in the same capacity, assistant superintendent? A. Yes.

Q. You were employed before that in what capacities? A. As foreman for the Union Iron Works.

Q. Are you a married man? A. Yes, sir. [67]

Q. Do you know the witness who has testified here, Mr. Powers? A. Yes, I know him well.

Q. I will ask you further, during the month of December, 1911, or at any other time, you accosted him on Pier—I have forgotten the number—any pier at all, 42 or any other pier, in this city and suggested that he go with you into the business of smuggling opium? A. No, I never did.

Q. You heard his testimony here, didn't you?

A. I did; yes, sir.

Q. That you said: "What was the matter with going into such a business?" A. Yes.

Q. Did anything of that kind occur? A. No.

Q. You didn't have any such conversation?

A. None whatever.

Q. There has been some testimony here as to certain opium which was taken off the steamship "Siberia," concealed by Powers and Mr. Fiedler, and afterwards taken to Oakland and there some attempt made to dispose of it; did you have anything to do with that matter at all? A. None whatever.

Q. Did you know anything about it?

A. No, not until after it occurred.

(Testimony of Robert Donaldson.)

Q. I will ask you whether you know this boatswain who has testified here and who is now under indictment for smuggling opium?

A. Yes, I know him well.

Q. How did you become acquainted with him?

A. Seeing the man on the ship.

Q. Your business? A. Daily contact.

Q. Your business takes you on board those ships?

A. Always.

Q. What is the nature of your business?

A. Inspection and one thing and another; looking after the repair work and so forth.

Q. Is there anything connected with the nature of your duties which would render it easy for you to facilitate the unlawful landing of opium? [68]

Mr. McNAB.—We object to that on the grounds that it is immaterial and irrelevant, if your Honor please.

The COURT.—The objection will be sustained.

Mr. LINDSAY.—The witnesses have testified here as to a certain conversation which occurred on the saloon deck of the steamship "Siberia" during the month of December, 1911, in which you told this Chinaman, Yung Tai, to give the opium to Mr. Powers. Did anything of that kind occur?

A. None that I know of.

Q. You would have known of it if it had occurred, would you? A. Sure.

Q. You didn't make any such statement?

A. I did not.

Q. Did you have any reason to believe that this

(Testimony of Robert Donaldson.)

boatswain, Yung Tai, was smuggling opium or had anything to do with smuggling opium?

A. No, I had no idea.

Q. You had no idea? A. None whatever.

Q. You said you have known Mr. Powers; did his business or his duties take him aboard these various ships? A. Oh, yes.

Q. Did he have just as much opportunity as you had to become acquainted with this boatswain, Yung Tai?

Mr. McNAB.—We object to that; it is absolutely immaterial.

The COURT.—Let him answer the question.

A. Repeat the question.

(Question was read by the Reporter.)

A. That is a question; I couldn't say; he might have and he might not have. My duties would take me more within those ships in a certain way; that is, with the chief officers, than Mr. Powers' duties would.

Mr. LINDSAY.—Q. But you say Mr. Powers' duties would carry him aboard the "Siberia" and these other ships?

A. Yes, sir; it was necessary to look after all of them. [69]

Q. Mr. Powers, in the course of his testimony, stated that you telephoned in his presence to a certain Chinaman in San Francisco—I haven't the name of the Chinaman here—but you remember the testimony, do you? A. Yes, I think I do.

Q. You remember what Mr. Powers said?

(Testimony of Robert Donaldson.)

A. About telephoning? Yes.

Q. Did anything of that kind occur?

A. No, did not.

Q. The name is Sung Key?

A. I don't know the man.

Q. Do you know a Chinaman named Sung Key?

A. No, I do not.

Q. Do you know this Chinaman in Oakland whose name has been mentioned here? A. I do not.

Q. You don't know him? A. No, sir.

Q. Wong Hugh, I think his name is; do you know him? A. No, I do not.

Q. Did you ever hear of him?

A. Never heard of him.

Q. Certain letter has been read here during the cross-examination of the witness Powers?

A. Yes.

Q. You received that letter, did you?

A. I did; yes, sir.

Q. By mail? A. Yes.

Q. With reference to your visit to the County Jail of Alameda county to see Powers, was it before or after you received that letter?

A. After I received the letter.

Q. After you received it? A. Yes.

Q. Did you at any time request him to write such a letter to you? A. I did not.

Q. Did you at any time state to this Chinaman, the boatswain of the "Siberia," that if he didn't want to give the opium to Powers to give it to you and put it in the stoke-hold? A. No, I never did.

(Testimony of Robert Donaldson.)

Q. Never did? A. Never did.

Mr. LINDSAY.—You may cross-examine. [70]

Mr. McNAB.—No cross-examination. Yes, just one question.

Mr. LINDSAY.—That's all.

Cross-examination.

(By Mr. McNAB.)

Q. You did interest yourself in trying to procure a pardon for this man, did you? A. I did, yes.

Q. Was it at his request?

A. At his request, through that letter.

Mr. McNAB.—That is all.

[**Testimony of R. P. Schwerin, for the Defendant.**]

R. P. SCHWERIN, called for the defense, sworn.

Direct Examination.

(By Mr. SWEASEY.)

Q. What is your official position?

A. Vice-president and general manager of the Pacific Mail Steamship Company.

Q. You reside in the City and County of San Francisco? A. I do.

Q. You have been on the coast for some length of time? A. Yes, sir.

Q. How long? A. About 20 years.

Q. You are acquainted with the defendant, Donaldson? A. Yes, sir.

Q. How long have you been acquainted with him?

A. 1907.

Q. Will you kindly state in what way you have been acquainted with him?

(Testimony of R. P. Schwerin.)

A. He was appointed the assistant to the marine superintendent. I told Mr. Chism I wanted a man who would examine the ships.

Mr. McNAB.—We object to any personal associations; the question was—is: What was the general reputation of the defendant in the community?

The COURT.—Yes, confine yourself to that.

Mr. SWEASEY.—I understand I wouldn't be permitted to show that.

The COURT.—No. The witness can testify, if he knows, as to the general reputation of this defendant among people who know him. [71]

Mr. SWEASEY.—Very well, I will confine myself to that.

The COURT.—Just one general question.

Mr. SWEASEY.—Q. Are you acquainted with the general reputation of Mr. Donaldson for truth, honesty and integrity in this community?

A. Acquainted with it as far as it pertains to our particular business.

Q. That business, I understand, has been over a long period of time?

A. Has been over a period of five years, and has been in contact with a large number of people.

Q. What is the general reputation of Mr. Donaldson for truth, honesty and integrity and veracity in this particular—

Mr. McNAB.—(Interrupting.) I submit that is not the statutory question, and the witness has not qualified himself as a competent witness as to the general reputation of the defendant.

(Testimony of R. P. Schwerin.)

The COURT.—If a man is acquainted with a defendant, doing business with him, meets people who know the man whose character is in question, why, although it may be a limited part of the community, still we may say he knows what his general reputation is among the people with whom he moves. That is the question.

The WITNESS.—I should believe that Mr. Donaldson would have a very high opinion with the people with whom he moves.

Mr. McNAB.—Ask that the answer be stricken out as not responsive.

Mr. SWEASEY.—Q. What is his general reputation in this community for truth, honesty and integrity? A. Good, so far as I know.

Mr. McNAB.—It has not been shown that he knows.

The COURT.—I should think that a man sustaining the relations that he does to this defendant would know.

Mr. McNAB.—I withdraw the objection.

Mr. SWEASEY.—Q. What do you consider his reputation in this community? A. Excellent.
[72]

Mr. SWEASEY.—That's all.

Mr. SWEASEY.—No cross-examination.

The COURT.—That is all.

[Testimony of Arnold Foster, for the Defendant.]

ARNOLD FOSTER, called for the defense, sworn.

Direct Examination.

(By Mr. SWEASEY.)

Q. You are a resident of the city and county of San Francisco? A. I am.

Q. What is your business, please?

A. Secretary and treasurer of the Union Iron Works.

Q. How long have you been such?

A. I have been with the Union Iron Works 14 years. I have been secretary and treasurer about 4 years.

Q. Are you acquainted with Mr. Donaldson, the defendant here? A. I am.

Q. Do you know his general reputation in this community for truth, honesty and integrity?

A. I do.

Q. What is that general reputation?

A. Very good.

Mr. SWEASEY.—That is all.

Mr. McNAB.—No cross-examination. If your Honor please, I submit that in a case of this description, no matter how many character witnesses might be produced, where the Government is not concerned or concerning itself with the character of a man but with a specific act charged, there ought to be a limit put on this sort of testimony.

The COURT.—If you do not propose to go into or introduce any character evidence, I will limit it.

(Testimony of D. G. Frazier.)

Mr. McNAB.—We do not propose to go into the question of character. We consider that the one question on trial is the guilt of the defendant in this case. [73]

The COURT.—Then I will have to limit it to this one witness; in other words, you can have three witnesses; you have had two now.

Mr. LINDSAY.—I do not understand what the Government's admission is.

The COURT.—Where the Government doesn't intend to introduce contradictory evidence, I hold that three witnesses to the point is sufficient.

[Testimony of D. G. Frazier, for the Defendant.]

D. G. FRAZIER, called for the defense, sworn.

Direct Examination.

(By Mr. SWEASEY.)

Q. You are a resident of the city and county of San Francisco? A. Yes, sir.

Q. How long have you resided here?

A. About 37 years.

Q. Do you occupy any official position at the present time?

A. Yes, sir; at the present time I am a commissioner of the Board of Works.

Q. Are you acquainted with the defendant, Mr. Donaldson? A. I am, quite well.

Q. How long have you known him?

A. Well, since he was about 16 years of age. I don't know just how long that is—about 25 years, I guess.

(Testimony of D. G. Frazier.)

Q. Do you know the general reputation in this community for truth, honesty and integrity of Mr. Donaldson? A. I do.

Q. What is that reputation? A. Excellent.

Mr. SWEASEY.—That is all.

Mr. McNAB.—No cross-examination.

Mr. SWEASEY.—Your Honor, I understand you are going to limit us.

The COURT.—Yes, you are limited.

Mr. SWEASEY.—That is our case.

Mr. McNAB.—We have closed, your Honor.

(Argument of the Assistant District Attorney, Mr. McKinley, here [74] followed.)

(Argument of Mr. Lindsay, for the defendant.)

The COURT.—Gentlemen of the jury: We will take an adjournment until to-morrow morning at 10 o'clock; and now that we have continued so far with the investigation of this case, listening to the argument, I will say to you that it is your duty not to converse among yourselves or with others, if you happen to be thrown together; don't read anything that may be published in any of the papers about it, and as far as possible refrain from forming any fixed opinion until the case is finally submitted to you for decision. We will now adjourn until to-morrow morning at 10 o'clock.

[Proceedings had November 26, 1912, Concerning Statement Made by Mr. McNab During Argument.]

November 26, 1912, Tuesday, 10 o'clock A. M.

The COURT.—Call the roll of the jurors.

(The jury-roll was called.)

The CLERK.—All present, your Honor.

The COURT.—Proceed with the argument.

(Mr. McNab closed the argument for the Government.)

(During the course of Mr. McNab's argument, he made the following statement: "Letters were pouring out of the jail, which letters were intercepted and which fixed the guilt upon these parties.")

Mr. LINDSAY.—We object to the statement just made by the District Attorney and assign it as error, the statement in which he refers to letters pouring out of the jail, which were intercepted and which fixed the guilt upon these parties; no such evidence is before [75] the jury.

Mr. McNAB.—I examined the record, if your Honor please, and had the Reporter transcribe a portion of it, from the testimony of Mr. Powers and it was just as I expected to find it—that letters had been written out of the Oakland Jail by these parties and had been intercepted, and that is how the authorities discovered the connection of these parties to this crime. I think, in order to settle the controversy, it would be better to read it into the record.

The COURT.—Yes.

Mr. McNAB.—(Reading:)

"Q. Did Mr. Donaldson have any conversation with you during that period of time relative to whether or not you should talk?

A. Yes, sir. The first time I met Mr. Donaldson after I had been released from jail; I went to him and asked him about Mr. Fiedler's release; Mr. Don-

aldson said he didn't want to show his hand; I told him my father was willing to go half of the bail for Mr. Fiedler; Mr. Donaldson would not show his hand, he said.

“Q. Mr. Tidwell never spoke to you about this matter until he sent for you after having seized these letters that had gone out from the jail which disclosed Mr. Donaldson's connection, did he?” And then after an objection and the objection being overruled, the witness made the answer:

“A. No, sir.”

I think, gentlemen, that ought to dispose of that.

Mr. LINDSAY.—We still insist upon our objection, that no such letters are evidenced and that no such letters are before this jury or Court.

The COURT.—That is very true; the letters themselves are not in evidence.

Mr. McNAB.—But what they disclosed, gentlemen, is in evidence, and it stands undenied before you.

(Mr. McNab then concluded his argument.) [76]

[Instructions.]

The COURT (Orally).—Gentlemen of the jury, there are four counts in this indictment, and in order to simplify your labor in your inquiries, and also because I believe it is the law as applied to the facts of the case, you will be instructed to return a verdict of not guilty as to the first and third counts of the indictment. That will leave for your consideration only the second and fourth counts of the indictment, which, in effect, charge the defendant has been guilty of conspiracy to secrete opium unlawfully brought

into the United States.

Conspiracy is the combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. The gist of the crime of conspiracy is the unlawful agreement or combination between the parties. This refers to the second count of the indictment in which the conspiracy is charged. If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy, is guilty and punishable under the law.

Ordinarily, gentlemen, in the prosecution of the offense of conspiracy, the Government has to depend upon circumstantial evidence. I do not understand that this case rests upon circumstantial evidence; it depends upon the direct evidence of the witnesses Powers, Fiedler, and the Chinaman, Young Tai.

When the fact of the conspiracy is established, it is [77] the law that the act of one conspirator is the act of all, and is binding upon all—that is, while the conspiracy is in prosecution. If, therefore, you find from the evidence to a moral certainty and beyond a reasonable doubt that a conspiracy in fact existed between the defendants Gallagher and Donaldson to do any of the acts charged in the indictment, and if you find further to a moral certainty and beyond a reasonable doubt that any one of these

parties did any of the overt acts alleged in the indictment, it will be your duty to find a verdict of guilty against the defendant on trial before you.

In determining the fact as to whether or not a conspiracy was actually formed to commit the offense against the United States described in the indictment, it is your duty to consider all of the facts and circumstances which have been established by the evidence. You have a right to take into consideration the relations between the parties as shown by the evidence, and all other circumstances which you believe to have been established, and apply to such facts and circumstances your own reason and common sense.

The defendant has been called as a witness in his own behalf. His testimony is before you, and you must determine how far it is credible. The deep personal interest which a defendant has in the trial and in its result should be considered by the jury in determining how far and to what extent, if at all, his testimony is worthy of credit. Of course, gentlemen, you are not to reject his testimony simply because he is the defendant; you are to weigh it fairly and impartially and consider it in the light of the other evidence, and from that determine whether or [78] not you will give it credit. If you believe the testimony of the defendant, you will, as a matter of course, return a verdict of not guilty, or, if that testimony has created in your mind any reasonable doubt as to his guilt, then it will also be your duty to return a verdict of not guilty.

You are instructed that it is not necessary that the

conspiracy should be successful in order that the defendant may be convicted. If you find from the evidence to a moral certainty and beyond a reasonable doubt that the defendant, Donaldson, who is now on trial, conspired with any of the other persons named in the indictment to commit any of the offenses charged therein, and that any one of the parties committed any overt act in furtherance of the conspiracy, it will be your duty to find the defendant guilty as charged.

The fourth count charges that the defendants Gallagher and Donaldson unlawfully, willfully, feloniously, fraudulently and knowingly received, concealed and facilitated the transportation and concealment after importation of 320 five-tael cans of opium prepared for smoking purposes, which opium had been theretofore, as the defendants well knew, imported into the United States contrary to law from some foreign port or place to the Grand Jurors unknown. It is also charged in this count that the defendants committed this offense by unlawfully, willfully, knowingly and feloniously aiding, abetting, counselling, inducing and procuring the commission of said offense by Powers and Fiedler.

With reference to these counts, gentlemen, you are instructed that if you find from the evidence to a moral [79] certainty and beyond a reasonable doubt that the defendant Donaldson aided, abetted, counselled, induced and procured Powers and Fiedler to smuggle the opium in question into the United States, or to receive, conceal or facilitate the transportation or concealment of the same after it was im-

ported, knowing it to have been imported contrary to law, and if you find that said opium was actually imported into the United States, that is, taken off the steamer "Siberia" and passed the customs lines and was captured in the city of Oakland in the possession of Powers and Fiedler, you will then be justified in finding a verdict of guilty against the defendant Donaldson, because under the laws of the United States whoever directly commits any act constituting an offense defined in the laws of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal.

I am also requested to give you some further instructions.

You are charged that the burden of proof in this case, as in all other criminal prosecutions, is under the Government, and it is not necessary for a defendant to offer evidence in disproof of any allegation of the indictment until the facts proven are sufficient to establish his guilt. The law presumes the innocence of the defendant, and that presumption abides with him throughout the trial and until his guilt is established, and he is entitled to the benefit of that presumption throughout the trial and in all your deliberations.

It is incumbent upon the Government to prove the guilt of a defendant by evidence which satisfies the minds of the jury to a moral certainty and beyond a reasonable doubt, [80] and that by means of evidence which produces in the minds of the jury an abiding conviction of the truth of the charge and which accords with and satisfies their reason and

judgment to a moral certainty. No conviction can be had upon the evidence introduced unless the evidence is such as excludes every single reasonable hypothesis except that of the guilt of the defendant. In other words, all the facts proved must be consistent with and not only point to the guilt of the defendant, but must be inconsistent with his innocence.

I have already instructed you upon this point, but I will repeat this.

Where a defendant takes the witness-stand, his evidence is to be judged by the same tests which are applied in determining the credibility of any other witness in the case. That is, you will consider the deportment on the stand, the manner in which he gave the testimony. You will also take into consideration any motive he has for departing from the truth and weigh it precisely the same as you would when applying to it the same test as you would to that of any other witness.

Evidence as to the good character of the defendant in the community in which he lives has been introduced before you, and it is not disputed that up to the time of the bringing of this charge—that his character in the community for truth, honesty and integrity was good; you will consider that as a fact established by the evidence, and proper for your consideration in support of the presumption of innocence, and it is a circumstance which tends, in a greater or less degree, to show innocence; but how much it [81] tends to show innocence is a question for the jury to determine in the light of the view you have taken of other testimony in the case.

If, upon consideration of all the evidence to which you have listened, you are satisfied beyond all reasonable doubt that the defendant did engage in the conspiracy alleged in the second count, or in the actual concealment of the opium alleged in the third count, then it will be your duty to return a verdict of guilty, notwithstanding the previous good character of the defendant.

I charge you that an accomplice may be defined to be one who is in some way concerned in the commission of a crime, and includes all persons who in any manner aid or abet or assist or participate in the criminal act.

Under this definition, the witnesses Powers and Fiedler were accomplices in the commission of an alleged crime now charged in the indictment; and if you believe the testimony of the witnesses Powers and Fiedler to be true, then the Chinaman was also an accomplice.

An accomplice is a co-conspirator.

I charge you that the testimony of a co-conspirator or accomplice should be viewed with distrust. That is, I do not mean it is your duty to reject the testimony, provided you believe it to be true, but simply you are to view it with caution, look at it with a great deal of care, and discover, if you can, whether the witness had any motive for departing from the truth; and consider also the manner in which the testimony was given, its reasonableness, its probability, and if you are satisfied beyond all reasonable doubt that those witnesses spoke the truth, then it is your [82] duty to act upon that testimony. But, if upon

the other hand, you are not satisfied of the truth of the testimony given by those witnesses, then—or, if you have any doubt on the subject, it will be your duty to return a verdict of not guilty. In other words, gentlemen, you are the exclusive judges of the credibility of the different witnesses who have testified before you, the witnesses' testimony you believe, of course you will act upon that; and if you do not believe it, reject it, and let your verdict be in accordance with your honest convictions upon the point.

I charge you that every witness is presumed to speak the truth; but that this presumption may be repelled by the manner in which a witness gives his testimony or by the character of the testimony offered, by the motives that may actuate a witness in offering his testimony, or by contradictory evidence, and any witness found by you to be wilfully false in any material part of his testimony is to be distrusted by you in other parts.

Gentlemen, with these instructions you may retire and deliberate on your verdict.

Mr. McNAB.—I understand the defendant is being tried on the second and fourth counts?

The COURT.—Yes.

[Exceptions to Instructions.]

Mr. LINDSAY.—Before the jury retires, the defendant, I understand, is required to respectfully reserve his exceptions to the instructions given by the Court, which we do, at the request of the Government and on his Honor's own motion; and also to the denial of the Court to give such instructions

as were requested by the defendant and not [83] given, or as were requested and modified. I understand that is the custom.

The COURT.—That is the rule; and as far as the instructions requested by you are concerned, the exception is sufficient. But it is barely possible that in reading some of these instructions for the Government, I may have inadvertently used some phrase that ought to have been left out because I have cut out two of the counts. Your exception wouldn't be good as to that.

Mr. LINDSAY.—I do not expect it to extend that far, your Honor.

The COURT.—Gentlemen, you may retire.

(Jury retired at 11 o'clock A. M.) [84]

The foregoing constitutes all the testimony and evidence introduced and offered upon the trial of the cause, and the entire charge given to the jury by the Court.

BE IT FURTHER REMEMBERED, that before the cause was argued to the jury, the said defendant presented to the Court certain proposed instructions in writing and requested the Court to give the same to the jury, but that the Court refused to give said instructions, or any of them, to the jury, to which refusal of the Court to give said instructions to the jury the defendant duly excepted before the jury retired, and his exception was by the Court allowed, as hereinbefore set forth. The said proposed instructions so requested and refused are as follows, to wit:

[Instructions Requested by Defendant and Refused.]

(a) In order to convict the defendant of the crime of conspiracy as alleged in the indictment, you must not only believe from the evidence beyond all reasonable doubt that such conspiracy was actually and completely formed, but that subsequent to such complete formation some one or more of the overt acts alleged in the indictment were committed and that such act or acts were in furtherance of the conspiracy and not a part of it.

Generally, a conspiracy, such as charged here, must have its formation stage, its period of organization, its preparatory steps to preliminary arrangements, which may consume considerable time before the parties are ready to begin actual open operations. During all such times, and until some act has been done to effect the purpose—some overt act—the crime has not been completed, and a conviction cannot be had without proof of such overt act, no matter how strong may be the proof as to the actual agreement or conspiracy to commit the crime. [85]

(b) I charge you that you cannot convict the defendant under either the counts for conspiracy, unless you find beyond a reasonable doubt that defendant entered into a conspiracy with others named in the indictment for the purpose therein stated, and that in pursuance of such common understanding and to carry such conspiracy into effect some one of the overt acts charged was committed as therein stated. In this connection I further charge you that no overt act charged or proven can be held by you as sufficient to establish the offense charged

unless you shall first have found such overt act to have been committed subsequent to the complete formation of the conspiracy, and that it was in furtherance of such fully completed conspiracy, and not a part of it; that such overt act must not be one of a series of acts constituting the agreement or conspiracy, but a subsequent independent one following the complete agreement or conspiracy and done to carry into effect the object of the original combination.

(c) In the indictment in this case it is charged that the defendant Donaldson committed two alleged overt acts in furtherance of the conspiracy charged, namely: That at a certain time and place he did introduce one David G. Powers to the boatswain and the engineer's cabin boy of the steamer "Siberia," and that at a certain time and place he did propose to said David G. Powers, and request said David G. Powers, to aid and assist in unlawfully landing in the United States from the steamship "Siberia," in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes.

You must determine from the evidence, first, whether such acts, or either of them, were actually committed by the defendant, and, second, whether such acts, if proven, were in furtherance [86] of the objects of the alleged conspiracy, and committed subsequent to its complete formation. It is not enough that it be proven that the said alleged acts were actually committed, for unless they followed the complete formation of the conspiracy, and were in furtherance of the object thereof, they are not

overt acts within the meaning of the statute. If you believe from the evidence that such acts, if proven, were a part of the alleged conspiracy and necessary to its complete formation and not subsequent to and in furtherance thereof, or if you have a reasonable doubt arising from the evidence as to such matter, the defendant cannot be convicted on such proof.

(d) Evidence has been given concerning an alleged overt act of the defendant Henry Gallagher, alleged to have been committed in furtherance of the conspiracy charged in the indictment. In this connection I charge you that no act of the defendant Gallagher can be considered by you as evidence of the guilt of the defendant Donaldson, unless it has been proven to your satisfaction and beyond all reasonable doubt that the said defendants Gallagher and Donaldson conspired and agreed together as alleged in the indictment. It is not enough that you may believe that either one of said defendants conspired with others. Before any act or declaration of the defendant Gallagher can be used against the defendant Donaldson it must clearly appear from the evidence that they were co-conspirators, as alleged in the indictment, and if it does not so clearly appear to your satisfaction and beyond reasonable doubt, you must disregard any and all evidence as to any act or declaration of said Gallagher. [87]

Stipulation [and Order Settling and Allowing Bill of Exceptions].

IT IS HEREBY STIPULATED AND AGREED that the foregoing Bill of Exceptions is true and cor-

rect, and that the same may be allowed and settled by the Court.

Dated January 9th, 1913.

BENJ. L. McKINLEY,
Assistant U. S. Attorney and Attorney for Plaintiff.
FRANK R. SWEASEY,
CARL E. LINDSAY,
Attorneys for Defendant.

The above and foregoing Bill of Exceptions is hereby settled and allowed by me this 15th day of January, 1913.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed Jan. 16, 1913, at 9:30 A. M. W.
B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.
[88]

Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America, plaintiff and defendant in error, and Robert Donaldson defendant and plaintiff in error, a manifest error hath happened, to the great damage of the said Robert Donaldson, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 21st day of December, in the year of our Lord one thousand nine hundred and twelve.

[Seal] W. B. MALING,
Clerk U. S. District Court, Northern District of
California.

By Lyle S. Morris,
Deputy Clerk U. S. District Court, Northern District
of California.

Allowed by:

WM. C. VAN FLEET,
United States District Judge. [89]

[Endorsed]: No. 5137. United States Circuit
Court of Appeals for the Ninth Circuit. Robert

Donaldson, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed Dec. 24, 1912. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [90]

Return to Writ of Error.

The Answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within Writ of Error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, on the day and at the place within contained.

We further certify that a copy of this Writ was, on the 24th day of December, A. D. 1912, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal]

W. B. MALING,

Clerk of the District Court of the United States for the Northern District of California.

By Lyle S. Morris,

Deputy Clerk. [91]

Writ of Error (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the Northern District of California, Greeting:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America plaintiff and defendant in error and Robert Donaldson, defendant and plaintiff in error, a manifest error hath happened, to the great damage of the said Robert Donaldson, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to cor-

rect that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable MELVILLE W. FULLER, Chief Justice of the *United*, the 21st day of December, in the year of our Lord one thousand nine hundred and twelve. [92]

[Seal] W. B. MALING,
Clerk U. S. District Court, Northern District of
California.

By Lyle S. Morris,
Deputy Clerk U. S. District Court, Northern District
of California.

Allowed by:

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Dec. 24, 1912. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [93]

Citation (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, and to John L. McNab, United States Attorney for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of

the United States District Court for the Northern District of California, wherein Robert Donaldson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 21st day of December, A. D. 1912.

WM. C. VAN FLEET,
United States District Judge. [94]

United States of America,—ss.

On this 24th day of December, in the year of our Lord one thousand nine hundred and twelve, personally appeared before me Lyle S. Morris, Deputy Clerk of the United States District Court for the Northern District of California, the subscriber, F. R. Sweasey, and makes oath that he delivered a true copy of the within citation to John L. McNab, the U. S. Attorney, for the Northern District of California this 24th day of December, 1912.

F. R. SWEASEY.

Subscribed and sworn to before me at San Francisco, California, this 24th day of December, A. D. 1912.

[Seal] LYLE S. MORRIS,
Deputy Clerk U. S. District Court, Northern District
of California.

[Endorsed]: No. 5137. U. S. Circuit Court of Appeals for the Ninth Circuit. Robert Donaldson, Plaintiff in Error, vs. The United States of America. Citation on Writ of Error. Filed Dec. 24, 1912. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [95]

Citation (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, and to John L. McNab, United States Attorney for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein Robert Donaldson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the North-

ern District of California, this 21st day of December, A. D. 1912.

WM. C. VAN FLEET,
United States District Judge.

United States of America,—ss.

On this 24th day of December, in the year of our Lord one thousand nine hundred and twelve, personally appeared before me, Lyle S. Morris, Deputy Clerk of the United States District [96] Court for the Northern District of California, the subscriber, F. R. Sweasey, and makes oath that he delivered a true copy of the within citation to John L. McNab, the U. S. Attorney, for the Northern District of California, this 24th day of December, 1912.

F. R. SWEASEY.

Subscribed and sworn to before me at San Francisco, California, this 24th day of December, A. D. 1912.

[Seal] LYLE S. MORRIS,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Dec. 24, 1912. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [97]

[Bond.]

KNOW ALL MEN BY THESE PRESENTS:
That I, ROBERT DONALDSON, as principal, and FIDELITY AND DEPOSIT CO. OF MARYLAND, as surety, are held and firmly bound unto the UNITED STATES OF AMERICA in the full and just sum of Two Thousand Dollars (\$2000.00),

to be paid to the said UNITED STATES OF AMERICA; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 5th day of December, A. D. 1912.

WHEREAS, at a District Court of the United States for the Northern District of California, in a suit depending in said Court between the UNITED STATES and ROBERT DONALDSON, numbered 5137, wherein said ROBERT DONALDSON was charged with the crime of conspiracy and of the offense of receiving, concealing and facilitating the transportation and concealment after importation of opium, and was thereafter brought to trial on said charge before a jury and was found guilty and sentenced to pay a fine of \$200.00 and to be imprisoned for the term of one year in the Alameda County Jail, in Alameda County, California, and whereas, after such conviction said ROBERT DONALDSON sued out in the United States Circuit Court of Appeals for the Ninth Circuit a writ of error to said District Court for the Northern District of California, and whereas, by an order made by the Honorable JOHN J. DE HAVEN, Judge of the United States District Court for the Northern District of California, on the 5th day of December, A. D. 1912, the said ROBERT DONALDSON has been admitted to bail pending the said determination in said United States Circuit [98] Court of Appeals for the Ninth Circuit of said writ of error, in the sum of Two Thou-

sand Dollars (\$2,000.00) and a Bond for the payment of costs upon said writ of error has been filed in the sum of One Hundred Dollars (\$100.00).

Now, the condition of the above obligation is such that if the said ROBERT DONALDSON shall personally appear and render himself in judgment on the final determination in said United States Circuit Court of Appeals for the Ninth Circuit, of said writ of error at and before the said District Court of the United States aforesaid or whenever or wherever he may be required to answer said judgment and all matters and things that may be adjudged against him, whenever the same may be prosecuted and render himself amenable to any and all Court orders and process in the premises and not depart the said District Court and said District without leave first obtained, and if said writ of error shall be dismissed and he shall appear and render himself in execution under the judgment herein, then the above obligation to be void; else to remain in full force and virtue.

ROBERT DONALDSON. (Seal)

FIDELITY AND DEPOSIT CO. OF
MARYLAND.

By JAMES W. MOYLES,
Its Attorney in Fact. (Seal)

Acknowledged before me the day and year first above written.

[Seal]

FRANCIS KRULL,
United States Commissioner for the Northern District of California, at San Francisco.

Approved:

BENJ. L. McKINLEY,
Assistant United States Attorney.

Approved:

FRANCIS KRULL,
United States Commissioner Northern District of California.

[Endorsed]: Filed Dec. 5, 1912. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [99]

**[Order Extending Time to January 24, 1913, to File
Proposed Bill of Exceptions.]**

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 5137.

UNITED STATES

vs.

ROBERT DONALDSON.

Good cause appearing therefor, IT IS HEREBY ORDERED that plaintiff in error, ROBERT DONALDSON, above named, may have to and including Friday, the 24th day of January, 1913, within which to prepare, serve, file and settle his pro-

posed Bill of Exceptions.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 24, 1912. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [100]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto annexed one hundred pages, numbered from 1 to 100, inclusive, contain a full, true and correct transcript of the records as the same now appear on file and of record in this office, in the case of the United States of America vs. Robert Donaldson et al., No. 5137. Said Transcript of Appeal having been made and compiled in accordance with "Praeceptum for Transcript," embodied in the said Transcript and the instructions of Frank R. Sweasey, Esquire, and Carl E. Lindsay, Esquire, attorneys for defendant and appellant herein.

I further certify that the costs of preparing and certifying to the foregoing transcript is the sum of Fifty-one Dollars and Eighty cents (\$51.80), and that the same has been paid to me by the attorneys for the appellant herein.

In witness whereof, I have hereunto set my hand and affixed the official seal of said District Court this

19th day of February, A. D. 1913.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk.

[Endorsed]: No. 2248. United States Circuit Court of Appeals for the Ninth Circuit. Robert Donaldson, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Northern District of California, First Division.

Filed February 19th, 1913.

FRANK D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.

**[Order Extending Time (Thirty Days) to File
Record.]**

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

UNITED STATES

vs.

ROBERT DONALDSON.

Good cause therefor appearing, IT IS HEREBY ORDERED that plaintiff in error may have thirty (30) days' additional time within which to prepare

and file the Record on Appeal in the above-entitled cause.

Dated : January 20th, 1913.

WM. W. MORROW,
Circuit Judge.

Due service, by copy, of the within Order Extending Time to File Record is hereby admitted this 20th day of January, 1913.

BENJ. L. McKINLEY,
Asst. U. S. Attorney.

[Endorsed]: Original. No. 2248. In the United States Circuit Court of Appeals for the Ninth Circuit. United States vs. Robert Donaldson. Order Under Rule 16 Enlarging Time to File Record Thereof and to Docket Case. Filed Jan. 21, 1913. F. D. Monckton, Clerk. Refiled Feb. 19, 1913. F. D. Monckton, Clerk.

No. 2248

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROBERT DONALDSON,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This case comes before this Honorable Court on writ of error under circumstances as follows:

On September 20, 1912, the Grand Jury presented and filed an indictment in four counts in the United States District Court in and for the Northern District of California. The first and third counts thereof charged plaintiff in error, Robert Donaldson, and one Henry Gallagher with conspiracy, as well as with actual participation, in unlawfully importing and bringing certain opium into the United States at the Port of San Francisco. The second and fourth

counts thereof charged plaintiff in error and said Henry Gallagher with conspiracy as well as with actual participation, in unlawfully receiving, concealing and facilitating the transportation and concealment after importation of certain opium known by said parties to have been imported into the United States contrary to law.

On November 25, 1912, plaintiff in error was arraigned and interposed a plea of not guilty whereupon on motion, the trial Court granted a severance of the trial of co-defendant, Henry Gallagher, and ordered that the trial of plaintiff in error proceed. (Trans., pp. 10-11.)

A jury was regularly drawn and empaneled to try the cause and the respective parties introduced evidence at the trial thereof.

At the close of the case for the Government, counsel for plaintiff in error requested that the jury be instructed to render a verdict of not guilty upon the first and third counts of the indictment, involving the allegations of importation and bringing of opium into the United States, which motion was granted (Trans., p. 73), whereupon the trial proceeded upon the second and fourth counts of the indictment which counts charged plaintiff in error jointly with Henry Gallagher as having conspired together and with David G. Powers and Emil Fiedler and others to wilfully, unlawfully and feloniously, receive, conceal and facilitate the transpor-

tation and concealment after importation, of a certain unknown quantity of opium, as also with the actual receiving, concealing and facilitating the transportation and concealment after importation at the City of Oakland, Alameda County, California, of 320 five-tael cans of opium, all of which opium as was alleged, defendant well knew had been previously imported into the United States contrary to law.

After argument of counsel the Court delivered its charge and submitted said cause to the jury for its decision, which after deliberation, rendered a verdict finding plaintiff in error not guilty on the first and third counts of the indictment and guilty on the second and fourth counts thereof. (Trans., pp. 12-13.)

From this verdict of guilty on the second and fourth counts, and the judgment entered thereon, motions for a new trial and in arrest of judgment having been denied (Trans., p. 15), thereafter and on the 15th day of December, 1912, a writ of error was allowed plaintiff in error by the said District Court to this Honorable United States Circuit of Appeals for the Ninth Circuit, for the purpose of obtaining a review of the said case and correcting the errors claimed by plaintiff in error to have been committed by the United States District Court for the Northern District of California, First Division.

Specification of Errors.

For a reversal of the judgment, plaintiff in error urges and relies upon the following specifications of error:

1. That the said District Court committed manifest error in overruling the objections of the attorneys for the defendant, Robert Donaldson, to the questions put by the United States Attorney to the witness, David G. Powers, as follows:

“MR. McNAB. Q. Mr. Tidwell never spoke to you about this matter until he sent for you after he seized these letters that had gone out from the jail which disclosed Mr. Donaldson’s connection, did he?

Question objected to on the grounds that it is immaterial and irrelevant, not redirect, is leading, and is based on something that is not in evidence—there is nothing here about letters being seized.

Objection overruled and exception.

A. No, sir.” (Assignment of Errors No. 1, Trans., p. 20.)

“MR. McNAB. Q. And it was only after he had this positive information in these letters relating to Mr. Donaldson and Mr. Gallagher that he ever sent for you at all?

Question objected to on the same grounds.

Objection overruled and exception.

A. Yes, sir.” (Assignment of Errors No. 2, Trans., p. 21.)

2. That the said District Court committed manifest error in refusing to give the following instructions requested by plaintiff in error, viz:

“In order to convict the defendant of the crime of conspiracy as alleged in the indictment, you must not only believe from the evidence beyond all reasonable doubt that such conspiracy was actually and completely formed, but that subsequent to such complete formation some one or more of the overt acts alleged in the indictment were committed and that such act or acts were in furtherance of the conspiracy and not a part of it.

“Generally a conspiracy, such as charged here, must have its formative stage, its period of organization, its preparatory steps and preliminary arrangements, which may consume considerable time before the parties are ready to begin actual open operations. During all such times, and until some act has been done to effect the purpose—some overt act—the crime has not been complete, and a conviction cannot be had without proof of such overt act, no matter how strong may be the proof as to the actual agreement or conspiracy to commit the crime.” (Assignment of Errors No. 3, Trans., p. 21.)

“I charge you that you cannot convict the defendant under either the counts for conspiracy, unless you find beyond a reasonable doubt that defendant entered into a conspiracy with others named in the indictment for the purpose therein stated, and that in pursuance of such common understanding and to carry such conspiracy into effect some one of the overt acts charged was committed as therein stated. In this connection I further charge you that no overt act charged or proven can be held by you as sufficient to establish the offense charged unless you shall first have found such overt act to have been committed subsequent to the complete formation of the conspiracy, and not a part of it; that such overt act must not be one of a

series of acts constituting the agreement or conspiracy, but a subsequent independent one following the complete agreement or conspiracy and done to carry into effect the object of the original combination." (Assignment of Errors No. 4, Trans., p. 22.)

"In the indictment in this case it is charged that the defendant Donaldson committed two alleged overt acts in furtherance of the conspiracy charged, namely, that at a certain time and place, he did introduce one David G. Powers to the boatswain and the engineer's cabin boy of the steamer 'Siberia,' and that at a certain time and place he did propose to said David G. Powers and request said David G. Powers to aid and assist in unlawfully landing in the United States from the steamship 'Siberia' in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes.

"You must determine from the evidence, first, whether such acts or either of them, were actually committed by the defendant, and, second, whether such acts, if proven, were in furtherance of the objects of the alleged conspiracy, and committed subsequent to its complete formation. It is not enough that it be proven that the said alleged acts were actually committed, for unless they followed the complete formation of the conspiracy, and were in furtherance of the object thereof, they are not overt acts within the meaning of the statute. If you believe from the evidence that such acts, if proven, were a part of the alleged conspiracy and necessary to its complete formation and not subsequent to and in furtherance thereof, or if you have a reasonable doubt arising from the evidence as to such matter, the defendant cannot be convicted on such proof." (Assignment of Errors No. 5, Trans., p. 23.)

“Evidence has been given concerning an alleged overt act of the defendant Henry Gallagher alleged to have been committed in furtherance of the conspiracy charged in the indictment. In this connection I charge you that no act of the defendant Gallagher can be considered by you as evidence of the guilt of the defendant Donaldson, unless it has been proven to your satisfaction and beyond all reasonable doubt that the said defendants Gallagher and Donaldson conspired and agreed together as alleged in the indictment. It is not enough that you may believe that either one of said defendants conspired with others. Before any act or declaration of the defendant Gallagher can be used against the defendant Donaldson it must clearly appear from the evidence that they were co-conspirators as alleged in the indictment, and if it does not so clearly appear to your satisfaction and beyond a reasonable doubt, you must disregard any and all evidence as to any act or declaration of said Gallagher.” (Assignment of Errors No. 6, Trans., p. 24.)

3. That the said District Court committed manifest error in giving to the jury the following instructions which were duly excepted to by plaintiff in error, viz:

“When the fact of the conspiracy is established, it is the law that the act of one conspirator is the act of all and is binding upon all,—that is, while the conspiracy is in prosecution. If, therefore, you find from the evidence to a moral certainty and beyond a reasonable doubt that a conspiracy in fact existed between the defendants Gallagher and Donaldson to do any of the acts charged in the indictment, and if you find further to a moral certainty and beyond a reasonable doubt that any one of these

parties did any of the overt acts alleged in the indictment, it will be your duty to find a verdict of guilty against the defendant on the trial before you." (Assignment of Errors No. 7, Trans., p. 25.)

"You are instructed that it is not necessary that the conspiracy should be successful in order that the defendant may be convicted. If you find from the evidence to a moral certainty and beyond a reasonable doubt that the defendant, Donaldson, who is now on trial, conspired with any of the other persons named in the indictment to commit any of these offenses charged therein, and that any one of the parties committed any overt act in furtherance of the conspiracy, it will be your duty to find the defendant guilty as charged." (Assignment of Errors No. 8, Trans., p. 25.)

"If upon consideration of all the evidence to which you have listened you are satisfied beyond all reasonable doubt that the defendant did engage in the conspiracy alleged in the second count or in the actual concealment of the opium alleged in the fourth count, then it will be your duty to return a verdict of guilty, notwithstanding the previous good character of the defendant." (Assignment of Errors No. 9, Trans., p. 26.)

4. That the said District Court committed manifest error in denying, refusing and overruling the defendant's motion for a new trial herein. (Assignment of Errors No. 10, Trans., p. 26.)

5. That the said defendant, Robert Donaldson, was not convicted herein by due process of law. (Assignment of Errors No. 13, Trans., p. 27.)

6. That the verdict of the jury herein upon which the judgment against the defendant, Robert Donaldson, was based is contrary to law, and contrary to the evidence adduced at the trial of said Robert Donaldson. (Assignment of Errors No. 14, Trans., p. 27.)

7. That the evidence adduced at the trial of the said defendant, Robert Donaldson, was insufficient to support the said verdict of conviction or the said judgment so rendered upon said verdict of conviction. (Assignment of Errors No. 15, Trans., p. 27.)

8. That the evidence adduced at the trial of said defendant, Robert Donaldson, on which the verdict of conviction against him was rendered and the judgment of conviction based, consisted entirely of the testimony of accomplices, and by reason thereof the said District Court committed manifest error in refusing to give the following instruction requested by the said defendant, viz:

“I charge you that the testimony of a co-conspirator or an accomplice ought to be viewed with distrust. You are to test its truth by inquiring into the probable motive which prompted it. You are to look into the testimony of other witnesses for corroborating facts. When it is supported in material respects you are bound to credit it, but where it is uncorroborated, you are not to rely upon it, unless after the exercise of extreme caution it produces in your minds the most positive conviction of its truth.” (Assignment of Errors No. 16, Trans., p. 28.)

It will readily be seen from the above specifications of errors that there are two main questions involved in this review:

First, the introduction of evidence, over the objections of plaintiff in error, relating to certain letters written out of the Alameda County Jail by one Emil Fiedler;

Second, the charge of the trial Court to the jury with reference to the subject of conspiracy and the essentials of an overt act thereunder.

Argument.

I.

ADMISSION IN EVIDENCE OF PRETENDED CONTENTS OF FIEDLER LETTERS.

There were but three witnesses on the part of the Government as to the circumstances set forth in the indictment, to wit: David G. Powers, Emil Fiedler and the Chinese boatswain Young Tai. All of these witnesses, according to the allegations of the indictment, as well as the testimony of witness Powers, were co-conspirators and accomplices of plaintiff in error. The testimony of the witness Fiedler, who did not personally know plaintiff in error at all, had never spoken with him in his life (Trans., p. 65), connected plaintiff in error with the alleged offense, solely by means of a statement made to him by David Powers that a man by the name of "Bob Donaldson" was a party to the

transaction (Trans., p. 61), and by simply having overheard a question asked of Powers by Young Tai the Chinese, "Is Donaldson all right?" (Trans., pp. 61, 66). The third witness for the Government, Young Tai, the Chinese boatswain, who, it is claimed by the Government, furnished the opium which was the subject matter of the alleged conspiracy, flatly denied that he had any opium, denied that he told anyone that he had any opium or would give anyone any opium and flatly denied that he did give anyone any opium or put any opium anywhere. (Trans., p. 72.)

The testimony of these three witnesses who, under circumstances most favorable to the Government, were but co-conspirators and accomplices of plaintiff in error, was not only in itself contradictory as above indicated and in further particulars hereinafter referred to, but at the same time, utterly lacked any corroboration whatsoever except such as was interjected into this case over the objections of plaintiff in error and the introduction of which is now assigned as error.

That the case for the Government as presented by these witnesses did receive corroboration from this impertinent evidence, there can be no question. In fact, the corroborative matter concerning the pretended contents of certain intercepted letters written by Emil Fiedler while in jail and after sentence, interjected into the case by questions propounded to the witness Powers, and by statements

made to the jury by the learned United States Attorney in his closing address, far transcended in probative value, any story that did or could have come from the lips of David Powers, the alleged co-conspirator and self-confessed accomplice in this certain alleged unlawful transaction in opium. In this connection, we most earnestly request this Honorable Court to carefully weigh the following extraneous matter thus engrafted onto this case by learned counsel in an overly ambitious desire to corroborate the story told by witness Powers, which corroborative matter was in and of itself, by far the most conspicuous element in the Government's case and unquestionably the most persuasive circumstance in bringing about the verdict rendered herein.

“Q. I understand certain letters were written by Mr. Fiedler in jail? A. Yes, sir.

Q. That is the way in which your connection with these people was learned? A. Yes, sir.

Q. You were subsequently brought before the Grand Jury because of those facts and brought face to face with them? (The last question being withdrawn upon objection made by attorneys for plaintiff in error.) (Trans., pp. 41-42.)

“Mr. McNAB. Q. Mr. Tidwell never spoke to you about this matter until he sent for you after having seized these letters that had gone out from the jail which *disclosed Mr. Donaldson's connection*, did he?”

Objected to on the grounds that it is immaterial and irrelevant, not redirect, is leading, and is based on something that is not in evi-

dence—there is nothing here about letters being seized.

The COURT. I will overrule the objection.

The WITNESS. What was the question?

(Question read by the reporter.)

Note our exception.

A. No, sir.

Mr. McNAB. Q. And it was only after he had this *positive information* in these letters relating to Mr. Donaldson and Mr. Gallagher that he ever sent for you at all?

We object to that on the same grounds.

The COURT. The objection will be overruled. Exception.

A. Yes, sir.” (Trans., pp. 56-57.)

“Mr. McNab closed the argument for the Government. During the course of Mr. McNab’s argument, he made the following statement: ‘Letters were pouring out of the jail, which *letters were intercepted and which fixed the guilt upon these parties*’.

We object to the statement just made by the District Attorney and assign it as error, the statement in which he refers to letters pouring out of the jail, which were intercepted and which fixed the guilt upon these parties; no such evidence is before the jury.

Mr. McNAB. I examined the record, if your Honor please, and had the reporter transcribe a portion of it, from the testimony of Mr. Powers, and it was just as I expected to find it—that letters had been written out of the Oakland jail by these parties and had been intercepted, and that is how the authorities discovered the connection of these parties to this crime. I think, in order to settle the controversy, it would be better to read it into the record.

The COURT. Yes.

Mr. McNAB. (Reading):

‘Q. Did Mr. Donaldson have any conversation with you during that period of time relative to whether or not you should talk?

A. Yes, sir. The first time I met Mr. Donaldson after I had been released from jail; I went to him and asked him about Mr. Fiedler’s release; Mr. Donaldson said he didn’t want to show his hand; I told him my father was willing to go half of the bail for Mr. Fiedler; Mr. Donaldson would not show his hand, he said.

‘Q. Mr. Tidwell never spoke to you about this matter until he sent for you after having seized these letters that had gone out from the jail *which disclosed Mr. Donaldson’s connection*, did he?’ And then after an objection and the objection being overruled, the witness made the answer:

‘A. No, sir.’

I think, gentlemen, that ought to dispose of that.

Mr. LINDSAY. We still insist upon our objection, that no such letters are evidenced and that no such letters are before this jury or Court.

The COURT. That is very true; the letters themselves are not in evidence.

Mr. McNAB. But *what they disclosed, gentlemen, is in evidence, and it stands undenied before you.*” (Trans., pp. 85-86.)

Where in the entire record in this case is there anything to be found more cogent in its influence upon a jury than those oft-repeated references to letters and their contents, made by the United States Attorney in that most earnest and forceful manner so characteristic of him? Those statements contained in the foregoing leading questions to the

effect that Mr. Tidwell, the Government agent, had seized letters "that had gone out from the jail which disclosed Mr. Donaldson's connection", and furnished him with "positive information" "relating to Mr. Donaldson and Mr. Gallagher", followed by the statement in the closing address to the jury that "letters were pouring out of the jail, which letters were intercepted and which fixed the guilt upon these parties".

The fact that these letters and their pretended contents were given such prominence at the trial and were dwelt upon with such minuteness of detail, is a circumstance clearly indicative of a firm belief then entertained by the United States Attorney, in their efficacy to bring about a verdict. His witnesses were not of his own choosing, they came before the jury discredited by their own testimony; however, in these letters he found a badge of respectability to which to pin the fate of his case, something which to the jury at least, was intrinsically innocent and undesigned, to corroborate and substantiate that which otherwise was contaminated and untrustworthy.

There can be no question as to the materiality and probative force of these statements, there remains but the single question as to how far the statements of the United States Attorney were justifiable and to what extent, if at all, the pretended contents of these letters was admissible in evidence as against plaintiff in error.

As indicating our position upon this question and as disclosing a serious infringement of the rights of plaintiff in error, we specify the following as the grounds relied upon:

First. The statement of Mr. McNab to the jury that letters were "pouring" out of the jail is not substantiated by the evidence, neither can support be found therein for his statement to the jury that letters had been written out of the jail by "these parties" (Trans., p. 85), the evidence in fact showing merely that more than one letter had been written out of the jail by Emil Fiedler. (Trans., p. 41.)

Second. The questions put by Mr. McNab to witness Powers (Trans., pp. 56-57), were decidedly leading and in their nature partook far more of the testimony of the worthy United States Attorney and his credibility, than that of his witness.

Third. The oral testimony concerning these letters was an admission of secondary evidence to prove their contents while the letters themselves, the best evidence, were withheld. That the alleged contents of these letters was before the jury, although the letters themselves withheld, we assume to be unquestioned in view of Mr. McNab's statement to the jury in his closing argument, in reply to our objections that the letters were not in evidence, "But what they disclosed, gentlemen, is in evidence, and it stands undenied before you." (Trans., p. 86.)

Fourth. The conclusions to be found in Mr. McNab's leading questions and statements to the jury, viz: "fixed the guilt upon these parties" (Trans., p. 85); "disclosed Mr. Donaldson's connection" (Trans., p. 56); furnished Mr. Tidwell "positive information" "relating to Mr. Donaldson and Mr. Gallagher" (Trans., p. 57), were unjustifiable, even conceding the contents of the letters referred to, to be themselves properly admissible and binding upon plaintiff in error. In such case the letters themselves should have been presented to the jury that they might draw their own conclusions therefrom. Mr. McNab in forcing upon the jury his own conclusions drawn from these letters, while withholding the letters themselves, can be properly characterized in no other manner than a usurpation of the functions of the jury.

Fifth. The letters themselves were not admissible. The contents thereof was not binding upon plaintiff in error for any purpose whatsoever and all reference thereto, whether in the leading questions objected to or in statements made during the closing argument to the jury, constituted irreparable injury to defendant's cause.

The offence is charged in the indictment as having taken place between December 1 and 13, 1911. Mr. Fiedler testified that he was arrested for the offence December 4 or 5, 1911. (Trans., p. 58.) He and Powers were sentenced to be imprisoned February 3d of the following year. (Trans., pp. 41, 49.)

It was not until sometime after Mr. Fiedler was in jail, and months after the alleged conspiracy and crime were consummated, that he wrote the letters in question. The statements contained in such letters were in no manner in aid or execution of any asserted conspiracy nor were they in furtherance of any of its objects, they were at best nothing more nor less than a recital of past events and binding upon no one other than the writer himself.

Upon this subject Wharton's Criminal Evidence (10th Ed.), Vol. II, Sec. 699, says:

“When the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted, by any subsequent act or declaration of his own, to affect the other.”

To same effect is II Wharton's Criminal Law (11th Ed.), Sec. 1673, and Underhill's Crim. Ev. (2d Ed.), Sec. 493.

In *Logan v. U. S.*, 144 U. S. 263, 309, Mr. Justice Gray, speaking for the Court, said:

“The Court went too far in admitting testimony on the general question of conspiracy. Doubtless in all cases of conspiracy, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. *U. S. v. Gooding*, 12 Wheat. 460, 469. But only those acts and declarations are admissible under this rule which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or by failure, the admissions of one conspira-

tor by way of narrative of past facts, are not admissible in evidence against the others."

The United States Courts, as well as the Supreme Court of California, has repeatedly expressly applied this doctrine to circumstances such as are here presented:

Brown v. United States, 150 U. S. 93;
 Ex Parte Black 147, Fed. Rep. 832, 840;
 Dwinnell v. United States, 186 Fed. Rep. 754;
 Goll v. U. S., 166 Fed. Rep. 419;
 Sorenson v. U. S., 143 Fed. Rep. 820; 168 Fed.
 Rep. 785;
 Hauger v. U. S., 173 Fed. Rep. 54;
 Tresca v. U. S., 183 Fed. Rep. 736;
 People v. Irwin, 77 Cal. 494-504;
 People v. Oldham, 111 Cal. 648-52;
 Del Campo v. Camarillo, 154 Cal. 647.

In this connection and as to the alleged contents of these letters, it must be borne in mind that Emil Fiedler, the writer thereof, testified that he did not personally know plaintiff in error at all, had never in his lifetime spoken with him (Trans., p. 65), and connected plaintiff in error with the alleged offense solely by means of a statement made to him by David Powers that a man by the name of "Bob Donaldson" was a party to the transaction (Trans., p. 61), and by simply having overheard a question asked of Powers by Young Tai, "Is Donaldson all right?" (Trans., pp. 61, 66.)

Any statement which Fiedler may have made in these letters in any way connecting plaintiff in error, must necessarily therefor have been merely what someone else had told him and therefore under the circumstances of the present case, hearsay evidence twice removed.

The testimony of Mr. Fiedler was to the effect that he knew nothing at first hand of plaintiff in error whatsoever, yet the United States Attorney in the leading questions objected to, told the jury that these letters written by Fiedler "disclosed Mr. Donaldson's connection" (Trans., pp. 56, 86); that Mr. Tidwell had this "positive information in these letters relating to Mr. Donaldson and Mr. Gallagher" (Trans., p. 57), and in his closing address to the jury told them that what these letters "disclosed" "is in evidence and it stands undenied before you" (Trans., p. 86), and that these letters "fixed the guilt upon these parties". (Trans., p. 85.)

That these letters, written by an alleged co-conspirator months after the alleged joint venture was consummated, were themselves inadmissible we deem unquestionable, yet how infinitely stronger and more persuasive was the method adopted by the United States Attorney with regard to these letters than would have been their simple introduction in evidence. If the letters contained no more than what was testified to by witness Fiedler as to his entire knowledge of plaintiff in error, they would have

in no sense constituted the "positive information" for the benefit of Mr. Tidwell, nor would they have "fixed the guilt upon" plaintiff in error. If these letters contained more than what was testified to by witness Fiedler as his entire knowledge of plaintiff in error, it would have involved the Government's witness in a most serious contradiction. In either case, however, the jury would not have had the credibility of the worthy United States Attorney to support them nor the benefit of his many eloquent conclusions therefrom to aid them in reaching their verdict.

We most earnestly submit that upon this first proposition alone, concerning the wrongful admission in evidence of the alleged contents of these Fiedler letters, sufficient has been shown to disclose grievous injury to defendant's cause and by reason of which alone he is clearly shown to be entitled to a new trial.

II.

CHARGE OF COURT AS TO CONSPIRACY AND OVERT ACT.

The second question presented upon this review involves the Court's charge to the jury with respect to the subject matter of conspiracy and the essentials of an overt act thereunder. (Assignments of Error 3-9, Trans., pp. 21-26.)

The first and second counts of the indictment were drawn under the provisions of section 5440, Re-

vised Statutes of the United States, which read as follows:

“If two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable, etc.”

It will be seen from a simple reading of this statute that the provisions thereof contemplate two elements as essential to an offence thereunder: First, the agreement constituting the conspiracy, and second, the overt act in furtherance of the objects of and following such completed conspiracy.

While it is true that many of the early decisions made rather light of the overt act, adopting the conspiracy as constituting the real offence, yet all question as to the relative importance of the overt act has been for all time set at rest by the recent decision of the United States Supreme Court in *Hyde v. United States*, 225 U. S. 347-57, where the Court speaks as follows:

“It is contended by the defendants that the conspiracy—the union in an unlawful purpose—constitutes the crime and that the requirement of an overt act does not give the offence criminal quality or extent, but that the provision of the statute in regard to such an act merely affords an opportunity to withdraw from the design without incurring its criminality.—Indeed it must be said that the cases abound with statements, that the conspiracy is the ‘gist’ of the offence or the ‘gravamen’ of it, and we realize

the strength of the argument based upon them. But we think the argument insists too exactly on the ancient law of conspiracy, and does not give effect to the change made in it by Sec. 5440. It is true that the conspiracy, the unlawful combination, has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act; but Sec. 5440 has gone beyond such rigid abstractions and prescribes, as necessary to the offence, not only the unlawful conspiracy, but that one or more of the parties must do an 'act to effect' its object, and provides that when such act is done 'all the parties to such conspiracy' become liable. Interpreting the provision, it was decided in *Hyde v. Shine*, 199 U. S. 62, 76, that an overt act is necessary to complete the offence. * * * It seems like a paradox to say that anything, to quote the Solicitor General, 'can be a crime of which no Court can take cognizance'. The conspiracy, therefore, cannot alone constitute the offence. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it, cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction."

We have thus under consideration an offence consisting of two equally essential elements, conspiracy and overt act. This overt act in order to meet the requirements of the statute must not only be an ingredient separate and distinct from the agreement or conspiracy, but at the same time must be a subsequent, independent act following a completed com-

bination and done to carry into effect the object of such original combination.

“Generally, a conspiracy, such as that charged here, must have its formative stage, its period of organization, its preparatory steps and preliminary arrangements, which may consume considerable time before the parties are ready to begin actual open operations. During all such time, and until some act has been done to effect the purpose—some overt act—the parties may abandon the conspiracy and be held guiltless of the offence.—Let us apply these legal principles to the case at bar, keeping in mind the duty of distinguishing between the conspiracy and the open acts done in furtherance thereof.” (Conspiracy contemplated fraudulent entries upon Government lands. Defendants secured sixteen persons and explained plot to them after which they agreed to make such entries, etc., and agreed to turn over titles thus acquired upon receiving so much per head and expenses.) “Now the practical question is whether, under such circumstances, the pleader is at liberty to adopt as an overt act the bargaining with the entrymen and the payment to them of the agreed stipend. Enough has appeared to brand the entrymen as co-conspirators. They were not innocent tools in the hands of the defendants to do some ministerial act. * * * Suppose they had been joined as defendants, as they might have been, and the indictment had outlined the entire conspiracy, the bargaining with the entrymen and the payment to secure their adherence would have been an essential part of the plot, really an enlargement of the conspiracy and not partaking of the nature of an overt act. A payment of \$500.00 in advance to defendant was so treated in *United States v. Babcock*, 3 Dill 581, Fed. Cas. No. 14487. The agreement of the sixteen

entrymen to co-operate was an essential part of the combination underlying this crime. The bargaining with them was an integral part of the secret plot. Thus far everything rested in agreements, and was relevant to the conspiracy."

Ex Parte Black, 147 Fed. Rep. 832-37.

"The crime charged against the defendants is a statutory offense and all the essentials required by the statute to constitute the offense must be proved before a conviction can be had, and under the statutes there must be not only a conspiring together by the parties to commit the offence, but to complete the offence denounced by the statutes, the formation of the conspiracy must be followed by the act charged in the indictment to have been done to effect its object, for otherwise the offence would not be made out. * * * This act, to effect the object of the conspiracy, must not be an act which is a part of the conspiracy. It must not be one of a series of acts, constituting the agreement or conspiring together, but it must be a subsequent, independent act, following a completed conspiracy, and done to carry into effect the object of the original combination."

United States v. Cole, 153 Fed. Rep. 801-3.

The same principle is announced in the following cases:

United States v. Richards, 149 Fed. Rep. 443-46;

United States v. Hirsch, 100 U. S. 33-34;

Hyde v. United States, 225 U. S. 347;

United States v. Milner, 36 Fed. Rep. 890;

United States v. Reichert, 32 Fed. Rep. 142.

In applying the principle of the foregoing decisions to the case at bar it becomes necessary briefly to refer to the character of the overt acts here charged.

The indictment, after alleging that Henry Gallagher and Robert Donaldson did unlawfully and feloniously conspire and agree "together and with one David G. Powers and one Emil Fiedler" and others, sets forth and designates two acts on the part of plaintiff in error as constituting the necessary overt acts, as follows:

First. The said Robert Donaldson "did propose to said David G. Powers, and request said David G. Powers to aid and assist in unlawfully landing in the United States from the steamship 'Siberia', in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes".

Second. The said Robert Donaldson "did introduce one David G. Powers to the boatswain and the engineer's cabin boy of the steamer 'Siberia', the names of which said last named persons are, to the grand jurors aforesaid, unknown".

We are thus presented with an indictment which, while at the same time expressly charging David Powers with having been a co-conspirator with plaintiff in error in the opium business, yet designates and relies upon the very first conversation in which opium was referred to, held between them (Trans., pp. 31-32) as constituting an overt act un-

der the provisions of this statute. During this first interview also, according to Government's witness Powers, plaintiff in error took Powers aboard the steamer "Siberia" and introduced him to Young Tai, the Chinese boatswain, another conspirator. (Trans., p. 32.) This simple introduction of one alleged conspirator to another, a mere preparatory step or preliminary arrangement, is thus relied upon as the second overt act, even though, according to Government's witness Powers it antedated any mention of the name of co-defendant Gallagher or any suggestion of the plot to co-conspirator Fiedler (Trans., p. 34) and prior to any knowledge on the part of Powers or Donaldson as to how much, *if any*, opium was in the possession of the Chinese, Young Tai (Trans., p. 32), to whom he was thus introduced.

If at this point the scheme had been immediately abandoned and no steps had ever thereafter been taken looking to the actual concealment or landing of the opium, we feel safe in asserting that counsel for the Government would not then be here contending that the parties herein named were guilty of a completed conspiracy under the statute. Yet, if the Government's contention be true and the acts under consideration really constituted "overt acts" under the statute, the defendant was as guilty after his introduction of Powers to the Chinese boatswain, as after the actual landing of the opium, for the crime is consummated by the "overt act".

In this connection it must be borne in mind that the boatswain was not merely an innocent tool to whom had been delegated the performance of some ministerial act. According to the testimony of both witnesses Powers and Fiedler, he was an essential and necessary co-conspirator. Had he been expressly joined as one of the defendants herein and had the indictment outlined the entire conspiracy, then this mere introduction of Powers to the boatswain by Donaldson would clearly appear in its true character, an essential part of the plot and one of the series of acts constituting the agreement or conspiring together.

Thoroughly convinced that these two alleged transactions were, if true, but a part and parcel of the preliminary conspiring together, we requested of the Court, but were refused, the three following instructions:

“In order to convict the defendant of the crime of conspiracy as alleged in the indictment, you must not only believe from the evidence beyond all reasonable doubt that such conspiracy was actually and completely formed, but that subsequent to such complete formation some one or more of the overt acts alleged in the indictment were committed and that such act or acts were in furtherance of the conspiracy and not a part of it. Generally, a conspiracy, such as charged here, must have its formative stage, its period of organization, its preparatory steps and preliminary arrangements, which may consume considerable time before the parties are ready to begin actual open operations. During all such times, and

until some act has been done to effect the purpose—some overt act—the crime has not been completed, and a conviction cannot be had without proof of such overt act, no matter how strong may be the proof as to the actual agreement or conspiracy to commit the crime.” (Requested Trans., p. 95; Assignment of Errors No. 3.)

“I charge you that you cannot convict the defendant under either the counts for conspiracy, unless you find beyond a reasonable doubt that defendant entered into a conspiracy with others named in the indictment for the purpose therein stated, and that in pursuance of such common understanding and to carry such conspiracy into effect some one of the overt acts charged was committed as therein stated. In this connection I further charge you that no overt act charged or proven can be held by you as sufficient to establish the offense charged unless you shall first have found such overt act to have been committed subsequent to the complete formation of the conspiracy, and that it was in furtherance of such fully completed conspiracy, and not a part of it; that such overt act must not be one of a series of acts constituting the agreement or conspiracy, but a subsequent independent one following the complete agreement or conspiracy and done to carry into effect the object of the original combination.” (Requested Trans., p. 95; Assignment of Errors No. 4.)

“In the indictment in this case it is charged that the defendant Donaldson committed two alleged overt acts in furtherance of the conspiracy charged, namely: That at a certain time and place he did introduce one David G. Powers to the boatswain and the engineer’s cabin boy of the steamer ‘Siberia’, and that at a certain time and place he did propose to said

David G. Powers, and request said David G. Powers, to aid and assist in unlawfully landing in the United States from the steamship 'Siberia', in the State and Northern District of California, six hundred cans of opium prepared for smoking purposes.

You must determine from the evidence, first, whether such acts, or either of them, were actually committed by the defendant, and, second, whether such acts, if proven, were in furtherance of the objects of the alleged conspiracy, and committed subsequent to its complete formation. It is not enough that it be proven that the said alleged acts were actually committed, for unless they followed the complete formation of the conspiracy, and were in furtherance of the object thereof, they are not overt acts within the meaning of the statute. If you believe from the evidence that such acts, if proven, were a part of the alleged conspiracy and necessary to its complete formation and not subsequent to and in furtherance thereof, or if you have a reasonable doubt arising from the evidence as to such matter, the defendant cannot be convicted on such proof." (Requested Trans., p. 96; Assignment of Errors No. 5.)

The Court not only refused to charge the jury in accordance with the foregoing requested instructions, thus leaving to the jury the determination of the question as to whether or not the two transactions alleged were in fact overt acts under the statute, but by the three following instructions given by the Court, entirely withdrew such question from the jury and in effect directed them that the transactions alleged in the indictment were, as a

matter of law, sufficient "overt acts" whereby to convict defendant under the statute.

"When the fact of the conspiracy is established, it is the law that the act of one conspirator is the act of all and is binding upon all,—that is, while the conspiracy is in prosecution. If, therefore, you find from the evidence to a moral certainty and beyond a reasonable doubt that a conspiracy in fact existed between the defendants Gallagher and Donaldson to do any of the acts charged in the indictment, and if you find further to a moral certainty and beyond a reasonable doubt that *any one of these parties did any of the overt acts alleged in the indictment*, it will be your duty to find a verdict of guilty against the defendant on the trial before you." (Given Trans., p. 87; Assignment of Errors No. 7.)

"You are instructed that it is not necessary that the conspiracy should be successful in order that the defendant may be convicted. If you find from the evidence to a moral certainty and beyond a reasonable doubt that the defendant, Donaldson, who is now on trial, conspired with any of the other persons named in the indictment to commit any of the offenses charged therein, and that *any one of the parties committed any overt act* in furtherance of the conspiracy, it will be your duty to find the defendant guilty as charged." (Given Trans., p. 88; Assignment of Errors No. 8.)

"If upon consideration of all the evidence to which you have listened you are satisfied beyond all reasonable doubt that the defendant did engage in the conspiracy alleged in the Second Count or in the actual concealment of the opium alleged in the Fourth Count, then it will be your duty to return a verdict of guilty, notwithstanding the previous good character of

the defendant.” (Given Trans., p. 92; Assignment of Errors No. 9.)

The first instruction above quoted as given by the Court, directing the jury that if they found “that *any one* of these parties did *any of the overt acts* alleged in the indictment, it will be your duty to find a verdict of guilty”, constituted not only a refusal on the part of the Court to instruct the jury as to the nature of an overt act as was requested, but was a withdrawal of such question entirely from the jury and a direction to them that each of the overt acts alleged in the indictment was, if true, as a matter of law, fully adequate to convict.

The second instruction given as above, directs the jury that if they found from the evidence “that *any one* of the parties committed *any overt act* in furtherance of the conspiracy, it will be your duty to find the defendant guilty as charged”. By such instruction the jury was not even limited in their considerations, to the overt acts alleged in the indictment, nor were they confined to overt acts committed by those first found to be co-conspirators of plaintiff in error. A verdict is directed whenever the jury shall have found that *any one of the parties* committed *any overt act* in furtherance of the conspiracy whatever, and leaves the jury entirely free to determine what acts constitute “overt acts”, without any instruction as to their requisites.

The third instruction above quoted as given by the Court over the objection of the defendant, loses sight of the overt act entirely. The jury is therein instructed that it is their duty to return a verdict of guilty "if upon consideration of all the evidence to which you have listened you are satisfied beyond all reasonable doubt that the defendant did engage in the conspiracy alleged in the second count".

In addition to the two alleged "overt acts" which we have heretofore had under consideration, the indictment specifies a third act as follows:

In furtherance of said conspiracy and to effect the object thereof the said Henry Gallagher "did go with the said David G. Powers, from the City and County of San Francisco, to the City of Oakland, in the State and District aforesaid".

Fully realizing that the testimony connecting plaintiff in error with Henry Gallagher was in every respect weaker and far less satisfactory in its nature than that connecting plaintiff in error with either Powers or Young Tai, the boatswain, resting as it did entirely upon the naked statements of Powers alone, we requested of the Court the following refused instruction:

"Evidence has been given concerning an alleged overt act of the defendant Henry Gallagher, alleged to have been committed in furtherance of the conspiracy charged in the indictment. In this connection I charge you that no act of the defendant Gallagher can be con-

sidered by you as evidence of the guilt of the defendant Donaldson, unless it has been proven to your satisfaction and beyond all reasonable doubt that the said defendants Gallagher and Donaldson conspired and agreed together as alleged in the indictment. It is not enough that you may believe that either one of said defendants conspired with others. Before any act or declaration of the defendant Gallagher can be used against the defendant Donaldson it must clearly appear from the evidence that they were co-conspirators, as alleged in the indictment, and if it does not so clearly appear to your satisfaction and beyond reasonable doubt, you must disregard any and all evidence as to any act or declaration of said Gallagher.” (Requested Trans., p. 97; Assignment of Error No. 6.)

The Court not only refused to give the foregoing instruction, thus limiting the considerations of the jury upon such point to such overt acts only as were committed by persons first found to be co-conspirators, but in the instructions complained of in Assignment of Errors No. 7 as given (Trans., pp. 87-88), directed the jury to find a verdict of guilty against the defendant when they should have found “that *any one of these parties* did *any of the overt acts* alleged in the indictment”. This injury to plaintiff in error’s cause was also greatly aggravated by the instruction complained of in Assignment of Errors No. 8 as given by the Court (Trans., p. 88), wherein the Court directed the jury that it was their duty to find defendant guilty as charged if they first found merely “that *any one* of the par-

ties committed *any overt act* in furtherance of the conspiracy”.

We respectfully submit that the trial Court's charge to the jury upon the subject matter of conspiracy and the essentials of an overt act thereunder, whereby plaintiff in error was charged with all of the acts of all the various parties, without confining such acts to those alleged in the indictment or to those of parties first shown to have been co-conspirators with him, was alone sufficiently violative of defendant's rights as to justify a reversal of this case. When to this be added the statements of counsel for the Government, under the sanction of the Court, that the complicity of plaintiff in error in these acts of Powers and Fiedler, as well as his ultimate guilt, were fully established by certain existing letters, the contents of which was in evidence, this conclusion becomes inevitable.

Conclusion.

There is no question but that Powers and Fiedler were engaged in transporting opium to Oakland where they were apprehended by the authorities with opium in their possession. It is also true that the stories told by Powers and Fiedler as to the details of the transportation across the bay and their subsequent adventures on the other side, are reasonably consistent with one another. However,

the stronger and more minute in detail these narratives of the actions of others were, the more injurious to defendant's cause became the Court's action complained of, in permitting the jury to be told, in substance at least, that their guilt was the guilt of plaintiff in error. This in effect, was the result of allowing the statements to be made to the jury that certain letters, the contents of which was in evidence, "disclosed Mr. Donaldson's connection", furnished "positive information relating to Mr. Donaldson and Mr. Gallagher", and "fixed the guilt upon these parties". This result was also in large measure contributed to by the instruction of the Court with reference to the "overt act", that all was necessary for conviction was that the jury should find "that any one of the parties committed any overt act in furtherance of the conspiracy". Through such procedure the complicity of plaintiff in error, in all of these matters, was established to the satisfaction of the jury, without the aid of any legally competent testimony whatsoever.

When we turn from this extraneous matter improperly interjected into this case for the sole purpose of showing complicity of Mr. Donaldson, and examine the records for legal evidence, tending in any degree to connect him with the particular undertaking in which Powers and Fiedler were engaged while on their voyage to Oakland, we find nothing that in any way can be compared in probative force, to these oft-repeated references to the Fiedler letters.

As has already been stated the entire evidence in this case connecting plaintiff in error with the particular transaction in opium carried on by Powers and Fiedler, rests almost, if not entirely, upon the testimony and statements of witness Powers.

The testimony of Young Tai, the boatswain, did not connect plaintiff in error with this particular transaction at all. He testified merely that plaintiff in error first came to him with Powers, told him that Powers was a good man and to give him the opium (Trans., p. 69), yet returned alone and told him "not to give it to that man, give it to me" (Trans., p. 70). The boatswain, however, positively testifying that during all such time he had no opium, that he told no one he had opium and gave no opium to any one (Trans., p. 72). The probative value of this man's testimony, if of any value whatever in connecting plaintiff in error with the particular transaction in opium carried on by Powers and Fiedler, dwindles into insignificance in view of the irresistible suggestions read into this case over defendant's objections and now assigned as error.

The witness Fiedler testified that he knew nothing whatsoever at first hand, of plaintiff in error. He testified that Powers told him that a man named Bob Donaldson was in the plot. This use of an influential name by Powers was, however, necessary to induce Fiedler to co-operate with him, for as testified to by Fiedler, he refused to go into this

plot until this name was used, after which, "it looked easy to me" (Trans., p. 59). Fiedler testified also that he heard the name of Donaldson subsequently used at an interview with Young Tai, the boatswain, when Young Tai inquired of Powers, "Is Donaldson all right?" (Trans., pp. 61, 66). In view of Power's testimony that Mr. Donaldson had, prior to this conversation, already proposed the project to him (Powers) and had taken him aboard the "Siberia" and introduced him to Young Tai, the man with the opium (Trans., pp. 31-32) with whom of course, under this theory, Donaldson must have had a certain intimacy, is it not strange that Young Tai should ask Powers, this new found acquaintance, whether his own confederate, Donaldson, was all right? If through curiosity, provoked by this anomalous question, we examine the record in this particular, a little more minutely, a strange inconsistency in the Government's case is presented.

According to the testimony of both Powers and Fiedler, Powers first interviewed Fiedler with reference to opium on Saturday (Trans., pp. 60, 49). At the conclusion of this first conversation between Powers and Fiedler, Powers said "all right meet me tomorrow morning and I will give you an introduction to the parties" (Trans., 59). Fiedler met Powers the next morning (Sunday morning), was taken aboard the "Siberia" and introduced to Young Tai, the boatswain (Trans., pp. 59, 60, 49).

Now Mr. Powers testified that plaintiff in error met him on Pier 42, where plaintiff in error first

made the proposal to him to go into the opium business after which, "we walked over and went aboard the 'Siberia', and Mr. Donaldson introduced me to Young Tai, who was there" (Trans., pp. 31-32). In this connection, Young Tai, the boatswain, testified that the time when Donaldson thus came to him with the witness Powers was "Sunday, one o'clock" (Trans., p. 68).

According to the testimony of Government's witnesses Young Tai and Fiedler, therefore, Powers had proposed the opium transaction to Fiedler on Saturday and on Sunday morning had introduced Fiedler to the boatswain, Young Tai; both events preceding the alleged transaction of Sunday afternoon when as is claimed, plaintiff in error proposed the alleged plot to Powers and introduced him to Young Tai (Trans., pp. 31-32).

Under this reversal of the order of the alleged transactions, this question, "Is Donaldson all right?", asked of Powers by Young Tai, indicative of a previous intimate relationship with Powers rather than with plaintiff in error, becomes natural and is susceptible of rational interpretation. The use thus made by Young Tai of the name of "Donaldson" in this question asked of Powers, certainly supports Young Tai's testimony that it was not until after this time that Donaldson visited him at all. At the same time, this circumstance is of no more significance and warrants no other or different inference than did the use by Powers of this influential name in the still earlier conversation

with Fiedler, while endeavoring to induce Fiedler to co-operate with him.

As to showing complicity of plaintiff in error in the particular transaction in opium carried on by Powers and Fiedler, the testimony of Powers receives no support from, but is materially discredited by, the testimony of these other Government witnesses. The unsupported testimony of this self-confessed accomplice who went out of his way to lay his story before the Government officials and thereby gained for himself a position as custom's agent (Trans., p. 52), even though it were in no particular discredited by the testimony of the other witnesses, is, however, not such evidence as would appeal to an average jury upon which to justify a verdict such as was here rendered. On the other hand, there was absolutely no alternative left to the jury in this case but a verdict of conviction, in view of the statements of the United States Attorney in his closing address, which statements the jury, under Court sanction, naturally assumed to be true, that "letters were pouring out of the jail, which letters were intercepted and which fixed the guilt upon these parties" (Trans., p. 85) and that what these letters disclosed "is in evidence, and it stands undenied before you" (Trans., p. 86).

We respectfully submit that upon this writ of error, the judgment of the District Court ought of right and according to the law of the land be reversed and a new trial granted, at which time the

defendant in error may still have abundant opportunity to prove its case against plaintiff in error under and in accordance with those well established rules of procedure here invoked, designed to preserve the liberty as well as the lives and property of all of its subjects.

Dated, San Francisco,
May 8, 1913.

FRANK R. SWEASEY,
Attorney for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

ROBERT DONALDSON,

Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

The argument in the brief of plaintiff in error is based upon two general propositions:

First, that the court below committed error in the admission of evidence relating to certain letters written out of the Alameda County Jail by one Emil Fiedler, and

Second, that the court committed error in its charge to the jury with reference to the subject of conspiracy and the essentials of an overt act in furtherance thereof.

The indictment in the case contains four counts. The first charges the plaintiff in error, together with one Henry Gallagher, with having entered into a conspiracy with one David G. Powers and one Emil Fiedler, also known as K. E. Fiedler, and divers other persons whose names are unknown, to fraudulently and knowingly import and bring into the United States at San Francisco in the Northern District of California, certain opium and certain preparations and derivatives thereof, to wit a large amount of opium prepared for smoking purposes, the exact amount of which being to the grand jurors unknown.

The second count charges a conspiracy between the same parties to fraudulently and knowingly receive, conceal and facilitate the transportation and concealment after importation, of certain opium and certain preparations and derivatives thereof, to wit, a large amount of opium prepared for smoking purposes, the exact amount being unknown to the grand jurors which, as the defendants well knew, was opium which had theretofore been imported into the United States contrary to law from some foreign port or place to the grand jurors unknown.

The third count charges plaintiff in error and Gallagher with fraudulently and knowingly importing and bringing into the United States and assisting in so doing, 320 five-tael cans of opium prepared for smoking purposes, by aiding and abetting,

counselling, inducing and procuring the commission of said offense by Powers and Fiedler.

The fourth count charges plaintiff in error and Gallagher with having fraudulently and knowingly received, concealed and facilitated the transportation and concealment after importation of the same opium described in the third count and that they did so by aiding and abetting, counseling, inducing and procuring the commission of the offense by Powers and Fiedler.

At the conclusion of the evidence on behalf of the Government the court instructed the jury to find plaintiff in error, who alone was on trial, not guilty upon the first and third counts, thereby leaving the second and fourth counts for their consideration, and the jury's verdict found plaintiff in error guilty on the second and fourth counts of said indictment.

I.

In order that we may intelligently discuss the first ground of objection urged by counsel for plaintiff in error, it will be necessary to consider the circumstances under which the evidence complained of was admitted by the trial court. At page 41 of the Transcript of Record, in the direct examination of the witness David G. Powers, the district attorney asked, and the witness answered, without objection, the following questions:

“Q. I understand certain letters were written by Mr. Fiedler in jail? A. Yes sir.

Q. That is the way in which your connection with these people was learned? A. Yes sir.”

These questions were entirely proper and no error could have been successfully assigned upon the asking or answering of either of them, even though counsel had made objection, which he did not.

On cross examination, Transcript page 51, the witness was asked by defendant's counsel when he first spoke to anyone about Donaldson's complicity in this matter. He replied substantially, in answer to questions, that he had told Mr. Tidwell, special agent of the Treasury Department, after he, the witness, had gotten out of jail, after serving a sentence for smuggling; that he had gone to Mr. Tidwell and told him the story he had told in court at the trial.

On page 52 of the Transcript, the witness further stated on cross examination in answer to questions, that Mr. Tidwell had recommended his appointment as a special customs agent before he had told Mr. Tidwell the story about Donaldson's connection with the offense under investigation and that afterwards he had received the appointment. He also testified, and was not contradicted, pages 52 and 53 of the Transcript, that Donaldson had visited him in the Alameda County Jail. The questions on redirect examination to which objection is made were asked for the purpose of explaining to the jury how Mr. Tidwell came to send for the witness and why the witness had made these disclosures to him as to Donaldson's complicity in the matter of smuggling opium. The inference sought to be left by the

cross examination was very evidently that Powers had told this story in order to get employment from the Government through the recommendation of Mr. Tidwell. The questions of the district attorney on redirect examination tended to bring out the fact that Mr. Tidwell had other information and that the witness, on being made acquainted with that fact, had made his disclosures to Mr. Tidwell. In other words, the district attorney sought to show on redirect examination, and quite properly, that instead of the witness being actuated by a motive of attempting to curry favor with the Government to his own pecuniary advantage, as the cross-examination was intended to convey, the story of Donaldson's complicity had been, as it were, forced from the lips of a witness reluctant to tell it, and who only consented to do so when he found that Mr. Tidwell had other information of which the witness was ignorant.

It therefore appears, First, that the questions asked by the district attorney on direct examination for the purpose of showing the method in which Powers' connection with the matter had first been discovered, were asked and answered without the slightest objection on the part of defendant's counsel. Second, that instead of leaving the matter as it then stood, counsel in an endeavor to discredit the witness before the jury, on cross examination sought to leave the inference that Powers was testifying against Donaldson and in favor of the Government in order that he might reap some pe-

cuniary advantage. Third, that the district attorney properly sought to overcome this inference by showing that Mr. Tidwell had never spoken to the witness about the matter until he had sent for him after having seized the letters that had gone out from the jail which disclosed Mr. Donaldson's connection with the criminal enterprise.

No attempt was made, on the part of the Government to introduce the letters in evidence or to read them before the jury and they were only referred to for the purpose of showing the manner in which the witness Powers had come into the case as a witness for the Government.

Objection is made to the closing argument of the district attorney in which he made reference to the testimony which has just been discussed. The portion of the argument complained of is found on pages 85 and 86 of the Transcript of Record. It appears therefrom that in the course of Mr. McNab's argument he said, "Letters were pouring out of the jail, which letters were intercepted and which fixed the guilt upon these parties."

We submit that the testimony above referred to fully justified this comment of the United States Attorney. If objection is made to the use of the word "pouring" it may very properly be observed that the evidence showed plainly that more than one letter was written. The fact is that the letters which had been intercepted, be they few or many, disclosed the connection of these parties with

the offense, or, to use the words of counsel for plaintiff in error on his cross examination of Powers, page 51, of the Transcript, disclosed "Donaldson's complicity of this matter."

But the district attorney was eminently fair in his closing argument to the jury for he read in full the testimony which justified the comment which he made. The portion appearing at the bottom of page 85 and in the first four lines of page 86 of the Transcript of Record, as having been read by the district attorney to the jury, is found in the testimony of the witness on page 40 of the Transcript of Record. The remaining questions and answers read by the district attorney to the jury are found on page 56 of the Transcript of Record in the redirect examination of the witness.

With reference to the objection that the form of the questions of the district attorney was leading, it should be remembered that a very large discretion is vested in the trial court in the matter of permitting leading questions, and that a judgment should not be disturbed merely because of the asking of leading questions, unless it very clearly appears that there was a gross abuse of discretion on the part of the trial court. The Transcript in the present case discloses no such state of facts.

A question is not rendered objectionable as leading because it embodies a fact already testified to by the witness; nor is it an abuse of discretion to permit leading questions in regard to matters which

the witness had before testified to in a more specific manner. 40 Cyc. 2432 and cases cited.

A leading question may be put to ascertain the real meaning of a witness who has given an ambiguous answer. 40 Cyc. 2433 and cases cited.

Where it is apparent that a witness has answered a question under a misapprehension as to its meaning, it is not error to allow him to be asked a leading question for the purpose of ascertaining what he in fact meant by his answer. 40 Cyc. 2433 and cases cited.

Even though a question is leading in form, error cannot be predicated upon the refusal to exclude it unless it relates to a material point. 40 Cyc. 2433.

In this connection it may be noted that the point about which these questions were asked was not one which was vital to the question of the guilt or innocence of the defendant upon any of the charges in the indictment. The questions were simply asked for the purpose of negating the idea that the witness Powers had gone to the Government officers with information against the defendant in order that he might benefit himself. It had nothing directly to do with the question of the guilt or innocence of Donaldson upon the charges made against him.

Whether questions assuming facts shall be allowed rests largely in the discretion of the trial

court, whose action may not be disturbed where no abuse of discretion is shown. 40 Cyc. 2435.

It is proper on re-examination to draw from the witness an explanation of his statements on cross examination, or of matters brought out on cross examination. 40 Cyc. 2524.

A witness may be interrogated as to circumstances tending to create wrong impressions which might result from matters brought out on cross examination. 40 Cyc. 2525.

Leading questions may properly be allowed if the purpose is to explain, develop or modify new matter brought out on cross examination. 40 Cyc. 2530.

II.

The second ground alleged by counsel for the reversal of the judgment herein is based upon the charge of the court to the jury with reference to the subject of conspiracy and the overt acts necessary in furtherance thereof.

The indictment, as we have already seen, contained four counts, on two of which plaintiff in error was convicted, one of the counts, the second, being for conspiracy and the other, the fourth, for receiving and concealing and facilitating the transportation and concealment after importation of certain opium. Upon the trial the jury rendered the following verdict, page 13, Transcript of Record:

“We, the Jury, find Robert Donaldson, the defendant at the bar, not guilty on the 1st and 3d counts of the indictment, and guilty on the 2d and 4th counts of the Indictment.”

The judgment of the court (pages 16 and 17 of the Transcript of Record), after reciting the filing of the indictment, the arraignment and plea, the trial, and the verdict of the jury, reads as follows:

“It is therefore ordered, adjudged and decreed that the said Robert Donaldson, having been duly convicted in this court on the 2d and 4th counts of the Indictment herein, be and he is hereby sentenced to be imprisoned for the term of 1 year in the Alameda County Jail, and further, that he pay a fine of \$200, and in default of the payment of said fine, that he be further imprisoned until said fine be paid.”

It will thus be seen that the court pronounced a general judgment upon the verdict. The verdict declared the defendant guilty on the 2d and 4th counts of the indictment, but the judgment did not attempt to apportion the punishment between the two counts, but was general in its form. The judgment pronounced was within the power of the court to impose upon either one of the counts upon which plaintiff in error was convicted. The punishment for conspiracy to commit an offense against the United States, denounced by section 37 of the Criminal Code of the United States, is imprisonment for not more than two years or a fine of not more than \$10,000, or both a fine and imprisonment.

Under section 2 of the Act of February 9, 1909, 35 Stats. at L., 614, under which the 4th count was drawn, the plaintiff in error could have been punished by a fine not exceeding \$5,000 nor less than \$50, or by imprisonment for any time not exceeding two years, or both. It follows, therefore, that if the conviction upon either count of the indictment was correct, the judgment must stand.

Claasen v. U. S., 142 U. S. 140;

Flickinger v. U. S., 150 Fed. 2;

Therefore, even conceding for the sake of argument, what we do not concede as a fact, that all counsel's arguments based upon the instructions of the court upon the conspiracy count of the indictment are sound, it still follows that the judgment must be affirmed because the other count is good and supported by the evidence.

Counsel devotes considerable space in his brief to a discussion of the overt acts charged in the indictment, in an effort to show that certain overt acts therein charged were not properly overt acts in furtherance of the conspiracy, but were part of the conspiracy itself and therefore that the court erred in not giving certain instructions regarding overt acts and their character.

The second count of the indictment contains three overt acts. Counsel objects as to two of them. It must be remembered that it is not necessary under the statute to prove *every* overt act alleged in the indictment. The proof of *any one* of such overt

acts will be sufficient. There can be no question that the third overt act, namely, that "the said Henry Gallagher, on the thirteenth day of December in the year of our Lord One thousand nine hundred and eleven, did go with the said David G. Powers from the city and County of San Francisco, to the City of Oakland, in the State and District aforesaid," (Page 7 of Transcript of Record), was an act in furtherance of the conspiracy and that there was ample evidence upon which the jury could find that said act had been committed. It follows, therefore, that even conceding for the sake of argument, which we do not concede as a fact, that counsel's contentions found on pages 21 to 33 are sound as to two of the overt acts, there is still a third one to which his argument does not apply, and therefore no harm could come to the defendant by the refusal of the court to give the instructions requested. It cannot be said simply because the two acts referred to may not be acts "in furtherance of the conspiracy" but were in fact part of the conspiracy itself (which we do not admit), that therefore no evidence of these acts could be admitted upon the trial. If they were part of the conspiracy it was competent to prove them.

At least one act remains which is not subject to this objection (if objection it be), and the Government was not required to prove every one of the overt acts charged in the indictment. Indeed, counsel expressly admits that such is the law, for in the fourth assignment of error, Transcript of Record

page 22, it appears that he requested an instruction (No. 12) to the general effect that defendant could not be convicted of conspiracy unless the jury found beyond a reasonable doubt that defendant entered into a conspiracy with others named in the indictment for the purposes therein stated, and that in pursuance of such common understanding and to carry such conspiracy into effect *some one of the overt acts charged* was committed as therein stated.

But we respectfully insist that the overt acts charged are in fact acts in furtherance of the conspiracy alleged in the indictment. The first act to which objection is made is the one charging that Robert Donaldson on the tenth day of December, 1911, within the State and Northern District of California, did introduce one David G. Powers to the boatswain and the engineer's cabin boy of the steamer "Siberia." The evidence clearly shows that the defendant Donaldson had actually perfected an agreement with the witness Powers to do the unlawful act some time before Donaldson introduced Powers to the persons named in this count. It also appears affirmatively that the witness Fiedler was an active member of the conspiracy before that time and that he had agreed with the witness Powers to take a part therein. The fact that he had not been personally introduced to Donaldson would not make him less a party to the conspiracy. In the light of the evidence before the court it must be perfectly plain that the agreement to unlawfully receive and conceal and facilitate the transportation

and concealment of the opium had been fully made between these parties before the act hereinbefore described was committed; and if such be the case, such act was unquestionably one in furtherance of the conspiracy. The conspiracy contemplated the unlawful transportation of opium, the importation of which into the United States was forbidden by law. This opium was to be procured and removed from the steamer "Siberia" which plied between ports of the Orient and the Port of San Francisco. The parties, including the plaintiff in error, had agreed that they would go into this enterprise, and as a step toward carrying it out, they went aboard the "Siberia" and Donaldson introduced Powers to the boatswain and the engineer's cabin boy of said steamer.

With reference to the second overt act, the same general observations will apply. It appears in evidence that Donaldson invited Powers generally to go into the "hop business." When this was agreed to, he further proposed, for the purpose of accomplishing the object of this agreement, that Powers assist in unlawfully landing in the United States from the steamship "Siberia," 600 cans of prepared smoking opium. In connection with the discussion concerning these two overt acts and the discussion of the question as to whether these acts are acts in furtherance of the general objects of the conspiracy, it may be observed that it is not necessary that every one of the conspirators mentioned in the indictment should have come into the

conspiracy at the same time, or on the same day, or that they should have met together and formally discussed the means and methods by which the conspiracy was to be carried out. If, as the evidence in this case shows, the defendant Donaldson first approached Powers upon the general subject of opium smuggling, procured the consent of Powers to enter into that unlawful enterprise, and then, after the two had agreed to do so, either had done any act to further the enterprise, such an act would be truly "in furtherance of the conspiracy" as far as Donaldson was concerned, even though none of the other parties had as yet entered into the conspiracy. It appears that afterwards Fiedler was taken into the conspiracy and agreed to perform his part. But this fact would not deprive the acts set forth in the indictment of their character as overt acts in furtherance of the conspiracy and, after the conspiracy had been completely formed, binding upon the persons who were then parties thereto.

It follows, therefore, that the instructions requested by defendant Donaldson upon the theory that these two overt acts were not acts in furtherance of the conspiracy but form a part thereof, were properly refused by the court.

The instructions given by the court to the jury are found on pages 86 to 93 inclusive, of the Transcript of Record and the instructions requested by defendant and refused by the court are found on

pages 95 to 97 inclusive, of the Transcript of Record.

In construing the charge of the court it is a universally recognized rule that the charge must be read as a whole and that every portion thereof must be read in connection with the other portions, with a view to determining whether or not the charge as a whole correctly states the law applicable to the case. It is not required that the court should give all instructions requested by either party precisely as requested, nor is it required that every requested instruction which correctly states the law should be given by the court as requested. If the charge as a whole is fair, and correctly states the principles of law which should govern the jury in their consideration of the evidence, error cannot be predicated upon the refusal of the court to give requested instructions which, although they may state principles correctly, have been substantially given by the court; and if the charge of the court is sufficiently clear so that the jury can readily understand the principles of law which should govern their deliberations, it is sufficient, even though a requested instruction, couched in language which may be technically correct from the standpoint of the lawyer, may not be given in the language in which it is drawn.

The court in charging the jury stated to them, in the first place, that they were required to consider only the second and fourth counts of the indictment and directed them to return a verdict of

not guilty as to the first and third counts. The court then gave a correct definition, in simple language, of the crime of conspiracy, stating that that definition referred to the second count of the indictment in which the conspiracy was charged. The crime of conspiracy was then defined by the court substantially in the language of section 37 of the Criminal Code of the United States. (Transcript of Record page 87). The court then told the jury that ordinarily in the prosecution of the offense of conspiracy the Government was obliged to depend upon circumstantial evidence, but that the present case, according to his understanding, rested upon direct evidence. He stated that it depends upon the direct evidence of the witnesses Powers, Fiedler and the Chinaman Young Tai. After this statement the following instruction was given (Transcript, pages 87 and 88).

“When the fact of the conspiracy is established, it is the law that the act of one conspirator is the act of all, and is binding upon all—that is, while the conspiracy is in prosecution. If, therefore, you find from the evidence to a moral certainty and beyond a reasonable doubt that a conspiracy in fact existed between the defendants Gallagher and Donaldson to do any of the acts charged in the indictment, and if you find further to a moral certainty and beyond a reasonable doubt that any of these parties did any of the overt acts alleged in the indictment, it will be your duty to find a verdict of guilty against the defendant on trial before you.”

This instruction, when taken in conjunction with the rest of the charge of the court, plainly advised the jury that before the act of one conspirator could be taken as the act of all and be binding upon all, the fact of the conspiracy or agreement to commit an offense against the United States must first be established. It further told the jury that the act of one conspirator is only the act of all while the conspiracy is in prosecution and therefore not after the conspiracy had closed or before the conspiracy had been entered into. The instruction further advised the jury that if they found from the evidence to a moral certainty and beyond a reasonable doubt that the conspiracy, as previously defined in the charge, in fact existed between Gallagher and Donaldson to do any of the acts charged in the indictment and if they further found to a moral certainty and beyond a reasonable doubt that any one of these parties did any of the overt acts alleged in the indictment, it would be their duty to find a verdict of guilty against Donaldson, who was on trial. The jury could not have understood that they had a right to find the defendant guilty whether the overt acts alleged were in furtherance of the conspiracy or not, for the reason that the court had already plainly stated to the jury (page 87 Transcript of Record), that it was necessary that one or more of said parties should do an act "to effect the object of the conspiracy." If the jury did not believe that the acts mentioned were for the purpose of effecting the object of the con-

spiracy, they could not have been misled by this charge, because the court had plainly said to them that before a defendant could be convicted of conspiracy, some one of the parties must do some act to effect the object of the conspiracy.

Among the instructions requested by the defendant and refused are instructions (a) and (b), pages 95 and 96 of the Transcript. We submit that while these instructions in the technical sense may be a correct general statement of the law of conspiracy, the substance of them, so far as it was necessary for the jury to understand it, was given in the instructions of the court above quoted and referred to. Requested instruction (a) advises the jury that in order to convict the defendant of the crime of conspiracy as alleged in the indictment, they must not only believe from the evidence beyond all reasonable doubt that such conspiracy was actually and completely formed but that subsequent to such complete formation some one or more of the overt acts alleged in the indictment were committed and that such act or acts were in furtherance of the conspiracy and not a part of it. Then follows certain language to the general effect that a conspiracy generally has its formation stage, its period of organization, etc., which may consume considerable time before the parties are ready to begin actual open operations and that during such times and until some overt act has been done to effect the purpose, the crime has not been completed and a conviction cannot be had without proof of such overt

act no matter how strong may be the proof as to the actual agreement or conspiracy to commit the crime.

It is respectfully submitted that the court gave the jury, so far as was necessary, substantially this instruction, couched in far simpler language and far better adapted to the ready understanding of a layman not skilled in the nice distinctions of the law.

Requested instruction (b) advised the jury that they could not convict the defendant under the count for conspiracy unless they found beyond a reasonable doubt that defendant entered into a conspiracy with others named in the indictment for the purpose therein stated and that in pursuance of such common understanding and to carry such conspiracy into effect some one of the overt acts charged was committed as therein stated. This requested instruction stated further that no overt act charged or proven could be held by the jury as sufficient to establish the offense charged unless they shall first have found such overt act to have been committed subsequent to the complete formation of the conspiracy and that it was in furtherance of such fully completed conspiracy and not a part of it; that such overt act must not be one of a series of acts constituting the agreement or conspiracy, but a subsequent independent one following the complete agreement or conspiracy and done to carry into effect the object of the original com-

bination. Stripped of its legal verbiage, this requested instruction simply means that there must first be a conspiracy or agreement between the parties named in the indictment to commit the offense therein described, and that after such agreement is proven to exist some one of the parties must do one of the overt acts charged in the indictment, to carry into effect the object of the conspiracy. Here again, the charge of the court already referred to and quoted, states the substance of this proposition in plain and simple language about which the jury could make no mistake. They must have understood that the overt acts committed by any of the parties to the conspiracy were required to be in furtherance of the object thereof because the court had made that plain in its definition of the crime of conspiracy.

After giving the instruction quoted above, the court proceeded to tell the jury that, in determining the fact as to whether or not a conspiracy was actually formed to commit the offense against the United States described in the indictment, it was their duty to consider all of the facts and circumstances which had been established by the evidence. He further told them that they had a right to take into consideration the relations between the parties as shown by the evidence and all other circumstances which they believed to have been established, and apply to such facts and circumstances their own reason and common sense. This charge, it will be noted, has reference to the proof of the

formation of the conspiracy or unlawful agreement, and is another evidence of the fact that the court's charge fully advised the jury that before proof of an overt act could avail to convict the defendant, it must be shown that the agreement had in fact been made.

The next paragraph of the charge of the court, page 88 of the Transcript of Record, has reference to the function of the jury in considering and weighing the testimony of the defendant. This instruction correctly states the law and, indeed, no exception has been taken to it.

The court next gave to the jury the following instruction (bottom page 88 and page 89 Transcript of Record), to which objection is made by counsel in his brief.

“You are instructed that it is not necessary that the conspiracy should be successful in order that the defendant may be convicted. If you find from the evidence to a moral certainty and beyond a reasonable doubt that the defendant, Donaldson, who is now on trial, conspired with any of the other persons named in the indictment to commit any of the offenses charged therein, and that any one of the parties committed any overt act in furtherance of the conspiracy, it will be your duty to find the defendant guilty as charged.”

We respectfully insist that this instruction is a perfectly correct statement of the law. The principal objection to it seems to be that the court used the words “and that any one of the parties committed any overt act in furtherance of the conspiracy”

instead of confining the overt acts to those charged in the indictment.

In disposing of this objection we must again remember that the charge of the court as a whole must be considered and that it is not either proper or fair to lift one sentence here and there out of the body of the charge and to consider such portion without relation to the rest. The court several times told the jury, and most particularly in the portion of the charge found on pages 87 and 88 of the Transcript, and hereinbefore quoted, that it was necessary that the Government should prove that some one of the parties did some one of the overt acts alleged in the indictment. We think therefore that this sentence of the court's charge could not possibly have been misunderstood by the jury.

With respect to requested instruction (c), found on pages 96 and 97 of the Transcript of Record, we respectfully insist that it does not correctly state the law and was therefore properly refused. It will be remembered that there are three overt acts charged in the indictment as having been done by different parties to the conspiracy in furtherance of the object thereof. In this requested instruction two overt acts alleged to have been committed by the defendant Donaldson in furtherance of the conspiracy are singled out, and the jury is told, in effect, that unless they find that these acts or either of them were actually committed by the defendant and that they were in furtherance of the objects

of the alleged conspiracy, the defendant could not be convicted. This instruction if given would have been misleading and erroneous for the reason that, once the conspiracy is established, not only the acts of Donaldson, but the acts of every other member of the conspiracy, in furtherance thereof, would be proper evidence to be considered in determining the question of the guilt of Donaldson. It therefore would have been highly improper for the court to say that if the jury had a reasonable doubt as to whether these two acts had been committed by Donaldson he could not be convicted. If the jury found that Donaldson had not committed either of these acts in furtherance of the conspiracy, but had found that he was a member of the conspiracy and that Gallagher had committed the third act which is alleged, they would still have been bound to find Donaldson guilty upon the second count of the indictment. For this reason, this requested instruction was very properly refused.

The requested instruction numbered (d) found on page 97 of the Transcript of Record, deals with the third overt act alleged to have been committed by Henry Gallagher in furtherance of the conspiracy charged in the indictment. Counsel by this requested instruction in effect asked the court to charge the jury that no act of Gallagher could be considered as evidence of the guilt of Donaldson unless it had been proven to their satisfaction and beyond all reasonable doubt that Gallagher and Donaldson conspired and agreed together as alleged

in the indictment, and that it was not enough that they should believe that either of these parties had conspired with others.

The charge of the court as given, plainly told the jury that the act of one conspirator was the act of all and binding upon all only when the fact of the conspiracy is established, that is, when the parties had been shown to have entered into the unlawful agreement, and that such acts were only binding upon the parties to the conspiracy while the same was in prosecution. There is no room for any misunderstanding on the part of the jury of the fact that only the acts of the parties to the conspiracy, and these only during the existence of the conspiracy, were binding upon the other parties thereto. They must have understood, therefore, that Gallagher's acts could not bind Donaldson unless Gallagher and Donaldson were co-conspirators.

Taking up again the charge of the court as given to the jury, after the portion last discussed on page 89 of the Transcript of Record, the court gave certain instructions with reference to the fourth count of the indictment. These instructions are found on pages 89 and 90 of the Transcript of Record and no objection has been made to them. Certain instructions then follow as to the burden of proof and the doctrine of reasonable doubt. The tests to be applied to the testimony of the defendant are then substantially repeated, apparently at the request of the defendant. Then follow instruc-

tions upon the question of good character. At the top of page 92 of the Transcript of Record, an instruction was given by the court as follows:

“If, upon consideration of all the evidence to which you have listened, you are satisfied beyond all reasonable doubt that the defendant did engage in the conspiracy alleged in the second count, or in the actual concealment of the opium alleged in the third count, then it will be your duty to return a verdict of guilty, notwithstanding the previous good character of the defendant.”

This instruction is objected to upon the ground that the court says nothing about overt acts therein. In answer to this position, we need simply reiterate what has been stated before, that the charge of the court as a whole must be looked at and that the nature of overt acts and the necessity for their proof have been sufficiently explained by the court in the charges previously given.

From the foregoing we conclude:

1. That the court committed no error in permitting the questions and the references in the argument of the District Attorney, which are complained of in counsel's brief.

2. That the instructions requested by the defendant and refused by the court were, so far as they correctly stated the law, sufficiently and substantially covered by the instructions actually given, and where not so covered were inaccurate and incorrect in their statements of law.

3. That the charge of the court considered as a whole sufficiently advised the jury of the principles of law which were applicable to the charge of conspiracy contained in the second count of the indictment.

4. Even though it be conceded for the sake of argument that all of the objections of counsel to the charge of the Court upon the conspiracy count of the indictment are well founded (which we do not admit), still, in view of the fact that the judgment of the court was a general one and within the court's power to impose upon either of said counts, it must stand, for the reason that there is one count of the indictment about which absolutely no question is raised by counsel in his brief.

For the reasons above stated it is respectfully urged that the judgment of the court below should be affirmed.

Respectfully submitted,

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Attorneys for Defendant in Error.

No. 2248

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROBERT DONALDSON,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

In our opening brief we stated that the case for the government, so far as it connects plaintiff in error with the transaction in opium testified to, rests solely upon the credibility of witness Powers. Counsel for defendant in error nowhere in his brief denies or even questions this statement.

Fiedler testified that he did not know plaintiff in error at all, knew nothing of him at first hand, and connected him with the transaction in opium testified to, solely by the use of Donaldson's name by Powers, and having overheard the single question asked of Powers by Young Tai, "Is Donaldson all right"? Young Tai, the Chinese boatswain, not only failed to connect Donaldson in any way whatsoever

with the transaction in opium testified to, but flatly denied that such transaction had ever taken place at all and denied the very existence of the opium in question.

Powers' story, by virtue of which alone, plaintiff in error is in any way connected with the elaborate adventure in opium testified to as having been carried on by Powers and Fiedler, was as follows: Plaintiff in error first approached Powers at Pier 42, proposed that Powers go into the opium business and gained his consent thereto. "So we walked over and went aboard the 'Siberia' and Mr. Donaldson introduced me to Wong Tai, who was there" (Trans. pp. 31-32). That, requiring some one to assist him, he, Powers, then went off the ship and met Mr. Fiedler on the barge Melrose when and where he proposed to Fiedler that he, Fiedler, also go into the opium business (Trans. pp. 33-34). Powers thus testifying that the plot was proposed to him by Donaldson before he approached Fiedler in regard thereto.

This testimony of Powers that the alleged plot was first proposed to him by Donaldson prior to his proposal of the same to Fiedler is, as was stated in our opening brief, flatly contradicted by the testimony of Young Tai and Fiedler, and in his reply brief, the United States attorney, instead of supporting Powers' testimony in this respect, adopts the testimony of the latter witnesses, thereby discrediting Powers upon this most vital point.

Young Tai, the boatswain, testified that it was Sunday afternoon at one o'clock, when Powers and Donaldson came on board the "Siberia" (Trans. p. 68), which visit, as testified to by Powers, immediately followed the alleged first proposal of the opium plot to Powers by Donaldson. Witness Fiedler testified, however, that Powers made the proposal to him, Fiedler, on Saturday and introduced him to Young Tai on Sunday morning (Trans. pp. 59-60-49), both transactions therefore preceding Donaldson's visit to the "Siberia" with Powers at one o'clock Sunday afternoon, and necessarily preceding the alleged proposal of the opium transaction to Powers by Donaldson which, as testified to by Powers, immediately preceded their visit to the "Siberia" with absolutely nothing intervening. In this connection, the United States attorney at page 13 of his brief, states:

"It also appears affirmatively that the witness Fiedler was an active member of the conspiracy before that time (visit of Powers and Donaldson to the 'Siberia') and that he had agreed with the witness Powers to take a part therein."

If Fiedler was an active member of the conspiracy before the visit of Donaldson and Powers to the "Siberia", then Fiedler was an active member of such conspiracy before the alleged proposal of the opium transaction by Donaldson to Powers which immediately preceded it. Furthermore, if these statements by the United States attorney and his other

two witnesses be true, then Powers did not come into this alleged plot through plaintiff in error, as testified to by Powers, neither was there any necessity for an introduction of Powers to Young Tai and, as suggested in our opening brief and not denied, there remains but one rational deduction to be drawn from the question asked of Powers by Young Tai, "Is Donaldson all right"? to-wit: That Donaldson was not the intimate of, nor the man who had made the preliminary arrangements with Young Tai, the man who, according to the government's theory, furnished the opium.

Counsel in his brief for defendant in error, nowhere questions our assertion that nothing is to be found in the entire record more cogent in its influence upon the jury than was this foreign matter concerning the Fiedler letters, yet ignoring the five suggestions with reference thereto, most earnestly advanced by us in our opening as disclosing a most serious infringement of the rights of defendant, he endeavors to justify the introduction and numerous references to the contents of such letters, by the assertion that "they were only referred to for the purpose of showing the manner in which the witness Powers had come into the case as a witness for the government" (brief p. 6).

In the two following paragraphs, however, counsel contends that the testimony concerning these letters (introduced solely for the purpose of showing Powers' connection with the prosecution?) "Fully

justified this comment of the United States attorney", to-wit: that "letters were pouring out of the jail, which letters were intercepted and which fixed the guilt upon these parties" (brief p. 6).

To save this evidence from the numerous infirmities suggested as ordinarily attaching thereto, and at the same time to justify its presentation to the jury, he suggests that its introduction was directed and restricted solely to the question as to how Powers became identified with the prosecution. However, not lacking in ingenuity to meet other and different emergencies confronting him, his very next suggestion is that this evidence (thus carefully restricted as to justify its admission?) thereafter and by virtue of some magic influence, suddenly became emancipated and of such general probative force and effect that it in and of itself "fixed the guilt upon these parties".

Thereafter, not satisfied with his two-page citation from Cyc. to the effect that sometimes, and in certain enumerated instances (in which enumeration, however, the present instance does not appear) leading questions are admissible, counsel proceeds to settle all questions by the most remarkable statement that this point, though justifying the United States attorney in saying to the jury that it fixed the guilt upon these parties, "was not one which was vital to the question of the guilt or innocence of the defendant".

"It had nothing directly to do with the question of the guilt or innocence of Donaldson

upon the charges made against him" (brief p. 8).

We confess that we are not fully satisfied as to how the worthy United States attorney would finally have this Court consider the matter in question. To gain its admission it is restricted to the insignificant role of exonerating witness Powers from an improper motive. To gain a verdict thereby, its significance is magnified to the actual proof of guilt of Donaldson. To justify its admission through leading questions, however, it conveniently shrinks to the insignificant role of having "nothing directly to do with the question of guilt or innocence of Donaldson".

However, utterly disregarding all such inconsistencies, we submit that not one suggestion is set forth in the reply brief which in any way whatsoever contradicts or even qualifies the statement in our opening brief, that this extraneous matter interjected into this case over defendant's objections, was the controlling factor in bringing about the verdict herein rendered, nor is there one valid argument advanced therein, in justification of the admission in evidence of the alleged contents of the Fiedler letters or the frequent and eloquent references thereto made by the United States attorney in his closing address to the jury, which statements, under Court sanction, the jury naturally assumed to be true and, which, unassisted by any legitimate testimony whatsoever, left absolutely no other

alternative with the jury than the verdict of guilty rendered.

We again most earnestly submit that upon this first point alone error of a most serious nature to defendant's cause has been shown, by reason of which alone, plaintiff in error is clearly entitled to a new trial.

As to the second general proposition advanced in our opening, involving the instructions by the trial Court to the jury, we still insist that the alleged proposal of the opium plot to Powers and the immediately succeeding introduction of Powers to Young Tai, both of which acts, according to Powers' testimony, occurred at the very first mention of opium by Donaldson to Powers, were, if true, essentially parts of the alleged conspiracy and in no sense succeeding independent overt acts done in furtherance thereof. The Court therefore deprived defendant of a material legal right in refusing to give the requested instructions "C" (Trans. p. 96) which error was greatly magnified by the erroneous instructions given, the defects of which have been fully pointed out in our opening.

Counsel in an endeavor to convince this Court that the requested instruction "C" did not correctly state the law and was therefore properly refused, materially misstates the substance of such requested instruction. He states (brief pp. 23-24) that said instruction reads, that unless the jury shall make certain findings as to the two overt acts mentioned,

“the defendant could not be convicted”. The conclusion of such requested instructions which counsel thus purports to set forth and from which as so set forth, he endeavors to draw deductions in disparagement thereof, as a matter of fact, reads “the defendant cannot be convicted *on such proof*” (Trans. pp. 96-97). The instruction as requested in no sense limiting the power of the jury to convict upon proof of any other overt acts, which is the sole objection urged by counsel against the validity of such proposed instruction.

A further point is advanced by counsel in reply to this second portion of our argument, as follows: That as the verdict herein rests upon both the second and fourth counts of the indictment, the general judgment rendered thereon must stand, even admitting the existence of errors in the instructions with reference to conspiracy, for, as contended, such judgment is still sufficiently supported by the verdict rendered upon the fourth count, which count, as claimed, is good and supported by the evidence. In support of such proposition counsel for defendant in error cites the case of *Claasen v. United States*, 142 U. S. 140.

In passing upon counsel's suggestion in that behalf, it must be borne in mind first, that throughout the trial there was actually no distinction made between the evidence bearing upon the conspiracy and that bearing upon actual participation in the unlawful act itself. That when the trial Court

coupled the first and third counts of the indictment, in withdrawing them from the jury, it naturally linked the second and fourth counts in the same way, to be sustained or overthrown together. No distinction was made between such counts either in the taking of testimony or in the arguments of counsel. In fact, the charge of actual participation was ignored throughout, the charge of conspiracy at all times being uppermost in the minds of all parties involved. While the Court, in its charge, did but barely refer to the fact that there were two counts involved, yet such point was further and almost hopelessly obscured by the action of the Court when, after directing the jury to return a verdict of not guilty upon the first and third counts of the indictment, it instructed them

“that will leave for your consideration only the second and fourth counts of the indictment, which, in effect, charge the defendant has been guilty of *conspiracy* to secrete opium unlawfully brought into the United States” (Trans. p. 86).

Further answering counsel's deductions drawn from the rule of *Claasen v. United States*, 142 U. S. 140, to-wit: That notwithstanding alleged defects in the instructions concerning conspiracy, the instant judgment finds sufficient support in the verdict rendered on the fourth count, we submit, that the present case falls rather within the principle of the more recent decision rendered by this Honorable Court in *Dwyer v. United States*, 170 Fed. R. 160,

wherein the foregoing decision was distinguished at page 166 thereof, in the following language:

“It is contended by the United States that the judgment being general in its nature, and not exceeding that prescribed for a single offence, the first and third counts charging subornation of perjury with respect to proceedings under Sec. 2 of the timber and stone act, relating to the preliminary proof, are sufficient to support the judgment, and the case of Claasen vs. United States, 142 U. S. 140, is cited as authority upon that proposition. But in that case the Court mentions the fact that the record did not ‘show that any instructions at the trial were excepted to’. In the present case the Court instructed the jury specifically with respect to the charges contained in the fourth, fifth and sixth counts.”

The Court holding that as such instructions were excepted to it follows that the judgment was erroneous as to such fourth, fifth and sixth counts and should be reversed. New trial granted.

With reference further to the efficacy of this verdict upon the fourth count to sustain the judgment rendered, irrespective of the alleged errors in instruction, we direct the Court’s attention to the fact that this verdict rendered upon the fourth count is itself not supported by the evidence. As referred to in our opening brief (p. 3), the fourth count charges defendant with having received, concealed and facilitated the transportation of opium in the following language:

“At Oakland, in the County of Alameda, in the State and Northern District of California,

then and there being, did *then and there* unlawfully * * * That said defendants did commit the offense set forth in this count of this indictment by *then and there* unlawfully, * * * aiding, etc.”

As there is absolutely not one suggestion in the record that defendant was ever in Oakland or Alameda County at all, it certainly has not been shown that he committed any offense “*then and there being*” or “*then and there*” aided and abetted this or any offense. While perhaps not impairing the venue of the action, we submit, that such deficiency constituted a material variance between the allegation and proof.

Furthermore, when in addition thereto it is borne in mind, that the government’s case, so far as it tended in any way to connect Donaldson with the transaction in opium described by Powers and Fiedler, rested entirely upon the testimony of Powers; that Powers came before the jury a self-confessed accomplice in crime; that his testimony was utterly lacking in corroboration, save that which was interjected into the case over the objection of plaintiff in error and now assigned as error; that his testimony was flatly contradicted in most vital particulars by the other witnesses for the government, we think that no other reasonable conclusion can be reached but that the frequent and eloquent references to the alleged contents of the Fiedler letters was the one controlling factor in bringing about the verdict herein, yet that such verdict as was rendered, be-

came inevitable by reason of the statements made to the jury by the United States attorney with the express approval of the Court, that "letters were pouring out of the jail, which letters were intercepted and which fixed the guilt upon these parties" and that what these letters disclosed "is in evidence, and it stands undenied before you".

It is in evidence here, and not contradicted, that plaintiff in error has always borne a good reputation and that through energy and application he has won place and distinction for himself in the business world, having been foreman of the Union Iron Works and for the past five years assistant superintendent of the Pacific Mail Steamship Co. (Trans. pp. 75, 80-84).

We most respectfully submit this case to this Honorable Court, fully satisfied that error of sufficient magnitude has been shown, fully authorizing the granting of a new trial herein, and with a firm conviction that this equitable Court will not brush lightly aside the considerations seriously advanced upon this appeal, thereby committing plaintiff in error to prison and wrecking his home and a future life of usefulness and promise, by virtue alone of this uncorroborated testimony of the witness Powers.

Respectfully submitted,

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